Supreme Court, U. S.
FILED
AUG 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-190

ELI LILLY AND COMPANY,
Petitioner,
v.
ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

Question 1: Can The Comptroller General Use His Limited Authority Under The Access-To-Records Provisions Of The Federal Procurement Statutes, 10 U.S.C. § 2313(b) And 41 U.S.C. § 254(c), As A Tool To Serve An Extraneous Purpose, Namely, To Collect Data For A GAO Industry Research Study? 13

Question 2: Can The Procurement Statutes, Which Grant Access Only To Records That "Directly Pertain To" And "Involve Transactions Relating To" A Negotiated Procurement Contract, Be Properly Construed To Give The Comptroller General The Right To Examine Virtually All Of Lilly's Cost And Pricing Records? 17

Question 3: In Reversing Summary Judgment For Lilly, Could The Seventh Circuit Properly Enter Summary Judgment For The United States Even Though The United States Did Not And Could Not Appeal The Nonfinal Order Of The District Court Denying It Summary Judgment, And Even Though Genuine Issues Of Material Fact Exist Concerning Other Claimed Improprieties In The Comptroller General's Purpose In Demanding Access To Lilly's Records? 21

Page

CONCLUSION 24

APPENDIX A—

4/12/78 Decision of the United States Court of Appeals for the Seventh Circuit, 574 F.2d 904 (7th Cir. 1978) 27

APPENDIX B—

11/30/76 Summary Judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division 53

APPENDIX C—

Statutes Involved 67

TABLE OF AUTHORITIES

Cases *Page*

Bristol Laboratories v. Staats, 428 F.Supp. 1388 (S.D. N.Y. 1977) *appeal docketed,* No. 77-6153 (2d Cir. Sept., 1977) 7

Donaldson v. United States, 400 U.S. 517 (1971) 13

Fountain v. Filson, 336 U.S. 681 (1949) 23

Hewlett-Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), *cert. denied,* 390 U.S. 988 (1968) 19, 20

Lynn v. Biderman, 536 F.2d 820 (9th Cir. 1976), *cert. denied,* 429 U.S. 920 (1976) 13

Marshall v. Barlow's, Inc. — U.S. —, 98 S.Ct. 1816 (1978) 17

Merck & Co. v. Staats, No. 74-1447 (D. D.C., Aug. 12, 1977) 7

See v. City of Seattle, 387 U.S. 541 (1967) 17

Smithkline Corporation v. Staats, No. 75-499 (E.D. Pa., filed Feb. 20, 1975) 7

United States v. Abbott Laboratories, No. 75C2345 (N.D. Ill., April 24, 1978) 7

United States v. Bisceglia, 420 U.S. 141 (1975) 14, 16

United States v. Humble Oil & Refining Co., 488 F.2d 953 (5th Cir. 1974), *vacated* 421 U.S. 943 (1975), *on remand,* 518 F.2d 747 (1975) 16

Watkins v. United States, 354 U.S. 178 (1957) 22

Statutes and Regulations

41 C.F.R. § 1-3.807-3(a) and (b) 2, 9

FRAP, Rule 41(b) 2

10 U.S.C. § 2306(f) 9, 18

	Page
10 U.S.C. § 2313(b)	3, 4, 5, 7, 17
26 U.S.C. § 7601	16
26 U.S.C. § 7602	16
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	5
28 U.S.C. § 1332	5
31 U.S.C. § 53	4, 14
31 U.S.C. § 60	4, 14
31 U.S.C. § 65	4, 14
41 U.S.C. § 254(c)	3, 4, 5, 7, 17
50 U.S.C. App. §§ 1211, *et seq.*	9
50 U.S.C. App. § 1216(e)(1)	9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Eli Lilly and Company ("Lilly"), respectfully petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision entered by that Court in Cause No. 77-1280 on April 12, 1978.

OPINIONS BELOW

The decision of the Seventh Circuit is officially reported at 574 F.2d 904 (7th Cir. 1978) and is Appendix A beginning at page 27 of this petition.[1] The Seventh Circuit, by

[1] References to the Appendices attached hereto will be made by "App." followed by the page number.

a split decision, reversed the summary judgment entered in favor of Lilly by the United States District Court for the Southern District of Indiana, Indianapolis Division, Judge Cale J. Holder presiding, in Cause No. IP 75-72-C. The Seventh Circuit's decision went even further and appears to order the District Court on remand to enter summary judgment for the government. The decision of the District Court, which consisted of findings of fact, conclusions of law and a judgment, is not officially reported, but it was appended to the dissenting opinion of Judge Pell in the Court of Appeals and is therefore reported with the Seventh Circuit's opinion. The District Court's decision is Appendix B beginning at page 53 of this petition.[2]

JURISDICTION

The judgment of the Seventh Circuit was made and entered on April 12, 1978. It reversed the summary judgment which the District Court had entered in favor of Lilly on the ground that the Comptroller General of the United States ("Comptroller General") was exceeding his statutory authority in demanding access to Lilly's confidential business records. Lilly timely filed a petition for rehearing and suggestion of rehearing in banc, which was denied by a divided court on June 30, 1978. Subsequently, the Seventh Circuit's mandate was stayed until August 4, 1978, to permit the filing of this petition, and since the petition was filed within that period, the stay will remain in effect until final disposition by this Court. FRAP, Rule 41(b).

This petition for certiorari was filed within ninety (90) days after the denial of Lilly's petition for rehearing on June 30, 1978, and this Court has jurisdiction to review the Seventh Circuit's decision pursuant to 28 U.S.C. § 1254(1).

[2] To avoid repetition of the District Court's decision, the appendix to Judge Pell's dissenting opinion in the Seventh Circuit has been omitted from Appendix A to this petition.

QUESTIONS PRESENTED FOR REVIEW

This case concerns the propriety of an attempt by the Comptroller General to force Lilly to show him its confidential cost and pricing records in order to facilitate a proposed research study by the General Accounting Office ("GAO") on the economics of the pharmaceutical industry. Specifically, the questions being presented for review are as follows:

1. Can the Comptroller General use his limited authority under the access-to-records provisions of the federal procurement statutes, 10 U.S.C. § 2313(b) and 41 U.S.C. § 254 (c), as a tool to serve an extraneous purpose, namely, to collect data for a GAO industry research study?

2. Can the procurement statutes, which grant access only to records that "directly pertain to" and "involve transactions relating to" a negotiated procurement contract, be properly construed to give the Comptroller General the right to examine virtually all of Lilly's cost and pricing records?

3. In reversing summary judgment for Lilly, could the Seventh Circuit properly enter summary judgment for the United States even though the United States did not and could not appeal the nonfinal order of the District Court denying it summary judgment, and even though genuine issues of material fact exist concerning other claimed improprieties in the Comptroller General's purpose in demanding access to Lilly's records?

STATUTES INVOLVED

The principal statutes involved in this case are 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c)[3], which provide in pertinent part as follows:

10 U.S.C. § 2313(b) (Armed Services Procurement Act)

"(b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide

[3] These statutes will often be referred to in this petition as the "access-to-records" statutes.

that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract."

41 U.S.C. § 254(c) (Federal Property and Administrative Services Act)

"(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. * * *"

These statutes are reproduced in full in Appendix C beginning at page 67 of this petition, along with the other statutes involved in this case, including 31 U.S.C. § 53 (Budget and Accounting Act of 1921), 31 U.S.C. § 60 (Legislative Reorganization Act of 1946) and 31 U.S.C. § 65 (Accounting and Auditing Act of 1950).

STATEMENT OF THE CASE

The petitioner, Lilly, is engaged in the manufacture and sale of ethical pharmaceutical drugs, and it periodically sells pharmaceuticals to agencies of the federal government pursuant to procurement contracts. On August 26, 1974, the Comptroller General of the United States sent a letter to Lilly demanding access to certain records which the Comptroller General claims are directly pertinent to, and involve transactions relating to, seven procurement contracts between Lilly and two federal agencies. The records to be examined are described in the letter as follows:

"* * * all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests. * * *"

The Comptroller General's demand purportedly is being made pursuant to the access-to-records provisions of the Armed Services Procurement Act, 10 U.S.C. § 2313(b), and the Federal Property and Administrative Services Act, 41 U.S.C. § 254(c), as well as pursuant to the access-to-records clauses included in the contracts as required by those statutes. Lilly opposed the demand on the ground that the Comptroller General is exceeding his statutory authority, for two principal reasons. First, the Comptroller General is using his authority for improper purposes, in that he is demanding access to Lilly's records for purposes extraneous to the purpose of the access-to-records statutes. Second, the records to which the Comptroller General demands access do not "directly pertain" to and do not "involve transactions relating" to the particular contracts in question, as required by the express terms of the statutes. Thus, in order to protect the privacy of its confidential cost and pricing records, Lilly filed suit against the Comptroller General asking for declaratory and injunctive relief. Jurisdiction was based on 28 U.S.C. § 1331, since the case arises under provisions of the federal procurement laws. Jurisdiction also was based on diversity of citizenship under 28 U.S.C. § 1332, because Lilly is an Indiana corporation with its principal place of business in Indiana, the Comptroller General is a citizen of a state other than Indiana, and the amount in controversy exceeds $10,000. The United States subsequently intervened in the

suit in order to assert a counterclaim against Lilly, asking the District Court to require Lilly to produce its records for examination.

The purposes behind the Comptroller General's demand for access to Lilly's records are revealed by the events preceding the demand, which are summarized in the District Court's findings. (App. 53-62.) In 1971, the Comptroller General appeared before the Subcommittee On Monopoly of the Senate Select Committee On Small Business. The hearings before that Subcommittee were concerned with the status of competition in the pharmaceutical industry, and the costs of pharmaceuticals procured by the government were discussed at length. When the Chairman of the Subcommittee (Senator Gaylord Nelson) learned of the Comptroller General's access-to-records authority under the procurement statutes, he directed the Comptroller General to invoke the statutes for the purpose of giving the Subcommittee a look at pharmaceutical companies' costs. More precisely, the purpose for which the Subcommittee wants access to pharmaceutical companies' cost records is to obtain cost and profit data on individual drugs and individual drug companies, and then to release that information to the public!

The Comptroller General thus proceeded to seek access to pharmaceutical companies' records for the purpose of providing data to the Subcommittee, as well as for the General Accounting Office's own purpose of conducting a research study on the economics of the entire pharmaceutical industry. (App. 56-59.) Initially, the GAO asked for and obtained the voluntary cooperation of Lilly and five other pharmaceutical companies in providing general information for a study of the industry. However, when the GAO reached the point of asking for an examination of specific cost and pricing records, Lilly and the other companies declined to participate further. The Comptroller General therefore abandoned his plan of obtaining the

records on a voluntary basis. In August, 1974, he sent letters to the same six pharmaceutical companies, demanding access to cost and pricing records on individual products purchased under specified procurement contracts, each of which contained the standard access-to-records clause required to be included in the contracts by 10 U.S.C. § 2313 (b) and 41 U.S.C. § 254(c). Subsequently, litigation was commenced between five of the pharmaceutical companies and the government, including this suit filed by Lilly.[4]

Since the Comptroller General is only using Lilly's procurement contracts with access-to-records clauses as a key to unlock the doors to Lilly's records, the government freely conceded before the District Court that the Comptroller General's purpose is *not* to audit Lilly's negotiations and performance of the particular contracts involved. (App. 61-62.) The government also conceded that it had no reason to believe that Lilly did anything illegal, improper or fraudulent in the negotiation or performance of the contracts. (App. 60-61.) Further, the government conceded that there is no reason to believe the government was induced by Lilly to enter into any of the contracts or to agree to any term of the contracts as a result of Lilly's failure to disclose information required to be disclosed at the time of contracting. (App. 61.) Consequently, after both Lilly and the government moved for summary judgment, the District Court granted summary judgment for Lilly, holding:

> "The Comptroller General's August 26, 1974, demand for access to Lilly's records exceeds his au-

[4] The other pending suits are as follows:

Bristol Laboratories v. *Staats*, 428 F.Supp. 1388 (S.D. N.Y. 1977), *appeal docketed*, No. 77-6153 (2d Cir., Sept., 1977)

Merck & Co. v. *Staats*, No. 74-1447 (D. D.C., Aug. 12, 1977) (motion to amend judgment pending)

Smithkline Corporation v. *Staats*, No. 75-499 (E.D. Pa., filed Feb. 20, 1975) (cross-motions for summary judgment pending)

United States v. *Abbott Laboratories*, No. 75C2345 (N.D. Ill., April 24, 1978) (motion to amend judgment pending)

> thority under the access-to-records clause in the contracts and under the statutes, 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), because the Comptroller General is using that authority for a purpose which neither the contract clauses nor the statutes were designed to serve, namely, for the purpose of conducting a research study on the economics of the entire pharmaceutical industry. Any administrative authority to investigate may be exercised only for a purpose for which the authority is granted. [Citations omitted.] Here, the purpose of the Comptroller General's access-to-records authority under negotiated contracts is to permit audits of the negotiations and performance of particular contracts awarded by negotiation. Congress has not given the Comptroller General coercive power to require private companies to participate in research projects undertaken by the GAO pursuant to 31 U.S.C. § 53 or otherwise, and his limited authority under the access-to-records clause in negotiated contracts cannot be used for such a broad purpose. [Citation omitted.]'' (App. 63.)

The District Court did not grant summary judgment for Lilly on the basis of the Comptroller General's other improper purpose of wanting cost and profit data to provide to the Senate Subcommittee, which intends to expose the data to the public. The government disputed that factual issue, thereby making summary judgment on that ground inappropriate. However, the existence of that issue was an implicit basis for the District Court's denial of the government's summary judgment motion.

The District Court also granted summary judgment for Lilly on the ground that—apart from the improper purpose behind the Comptroller General's demand—the categories of records to which he wants access do not fall within the scope of the access-to-records statutes and clauses in the contracts. (App. 64-65.) To understand that holding, an understanding of the nature of the seven contracts involved

is important because the statutory standard is that the records must ''directly pertain to'' and ''involve transactions relating to'' the *contract*. Each of the contracts was awarded as a result of the federal agency's solicitation of a proposal from Lilly. With respect to six of the contracts, the agency evaluated and accepted Lilly's offered prices by comparing those prices to Lilly's standard catalog prices for the drugs being purchased. In each case, the contract price was lower than the wholesale commercial catalog price, which means the government in each case acquired Lilly products at prices lower than the going commercial market prices. With respect to the seventh contract, offers were submitted by two companies and the award was made to Lilly because, *inter alia*, the agency determined that the offered price was fair and reasonable based on the competition received. (App. 55.)

The contract prices in each contract were identical to the prices initially offered by Lilly and were not actually ''negotiated.'' The prices in each contract were fixed at the time of contracting and were not based on any type of ''cost'' formula dependent on Lilly's cost of production. In addition, Lilly was not required to submit cost or pricing data to the contracting agencies prior to the award of any of the contracts, because the product prices in all of the contracts were based either on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public, within the exemption provisions of the Truth-In-Negotiation Act [10 U.S.C. § 2306(f)] and, in the case of one contract, the exemption provisions of the similar federal procurement regulation [41 C.F.R. § 1-3.807-3(a) and (b)]. Moreover, each of the contracts was exempt from the Renegotiation Act (50 U.S.C. App. §§ 1211, *et seq.*) because the contracts were for standard commercial articles. 50 U.S.C. App. § 1216(e)(1). (App. 55.)

Hence, in light of the nature of the contracts, it is undisputable that neither the negotiations nor the perform-

ance of the contracts by Lilly or the government were in any way dependent upon, or directly related to, Lilly's costs of producing the drugs purchased under the contracts, the profits realized by Lil , or the methodology by which Lilly establishes its catalog prices. (App. 55-56.) The District Court therefore held that the categories of records to which the Comptroller General is demanding access—namely, Lilly's cost and pricing records—do not "directly pertain to" and do not "involve transactions relating to" these particular contracts as required by the express terms of the access-to-records statutes. (App. 64.) At the same time, though, the District Court granted the Comptroller General access to those records which do directly pertain to the contracts, including Lilly's contract files on the specified contracts and those records which would enable the Comptroller General to determine that the prices received by the government were equal to or less than the going market prices. (App. 65.)

The Seventh Circuit, by a 2-1 vote of the panel, reversed the District Court's opinion in its entirety. The majority first held that the Comptroller General may demand access to Lilly's records for the purpose of collecting data for a research study on the economics of the entire pharmaceutical industry. (App. 34-40.) In essence, the majority's holding is that the Comptroller General may use his access-to-records authority under the procurement statutes in order to facilitate any of the general powers granted to the Comptroller General by other unrelated acts. This is a radical enlargement of the Comptroller General's powers. Second, the majority held that Lilly's cost records, including records on indirect costs such as research and development which cannot be allocated to particular products or contracts, do directly pertain to the contracts involved, because Lilly's costs have some impact on the price of the products purchased under the contracts. (App. 40-44.) In other words, all of Lilly's cost records directly pertain to

the contracts even though the *contract* prices derived from Lilly's standard catalog prices and were not related to Lilly's costs of production. Finally, since the majority concluded that the Comptroller General's demand was proper on its face, it remanded with directions to enter summary judgment for the government even though the government did not and could not technically appeal the nonfinal order denying its motion for summary judgment, and even though material issues of fact remain in the case. Those issues relate to the other improper purpose behind the Comptroller General's demand, *i.e.*, exposure of confidential records for the sake of exposure, as well as to whether the Comptroller General is in reality seeking access to *all* of Lilly's records and will therefore exceed his authority once access is granted.

REASONS FOR GRANTING THE WRIT

This case, if left unreviewed, will have a profound effect on the rights of private companies who enter into supply contracts with the federal government. It will virtually end their right to maintain the privacy of their confidential business records. The majority opinion of the Seventh Circuit in effect holds that the Comptroller General may use his access-to-records authority under the procurement statutes for the purpose of facilitating any of his general powers granted under other acts, including his power to conduct research studies. The majority further holds that the Comptroller General may demand access to all of a private contractor's cost records, even though neither the negotiation nor performance of the contractor's particular procurement contract is directly related to, or dependent on, the contractor's costs. The majority holds that whenever the government has been supplied one product by a company, the government has a right of access to the nonallocable research and development records and the marketing records on *all* company products. No other court has

driven so deeply the thin edge of the wedge or has construed the Comptroller General's authority so broadly, either enlarging the purposes for which the Comptroller General can demand access to contractor's records, or diminishing the statutory requirement that the records must directly pertain to, and must involve transactions relating to, the procurement contract involved. The combined effect of the majority's holdings is that the Comptroller General can now for the first time demand access to almost all of a private contractor's records for practically unlimited purposes, rather than just for the procurement purposes of auditing government contracts.

Furthermore, the majority's holdings are not unique to Lilly's contracts or the contracts of pharmaceutical companies in general. Since the access-to-records statutes apply to *all* negotiated procurement contracts, the majority's opinion will impact on the literally thousands of private companies who enter into procurement contracts with the federal government. As a practical matter, the confidential books and records of those companies will be converted into open-access libraries for use by the Comptroller General in his research projects or in aid of any of his general powers. Consequently, all of those companies will now have to choose between sacrificing the privacy of their records to an extent never before anticipated, or refraining from doing business with the federal government. Congress certainly did not intend to create such a Hobson's choice when it enacted the access-to-records statutes.

Accordingly, this case presents important questions under the federal procurement laws which have not been, but should be, settled by this Court. As aptly characterized by Judge Pell in his dissenting opinion:

> "* * * [T]he majority opinion in this case [is] an unwarranted, and unfortunate, extension of the Big Brother concept into legitimate privacy in the industrial field, * * *." (App. 51.)

Question 1: Can The Comptroller General Use His Limited Authority Under The Access-To-Records Provisions Of The Federal Procurement Statutes, 10 U.S.C. § 2313(b) And 41 U.S.C. § 254(c), As A Tool To Serve An Extraneous Purpose, Namely, To Collect Data For A GAO Industry Research Study?

One of the undisputed facts in this case is that the Comptroller General is using his authority under the access-to-records statutes for the purpose of collecting data for a research study on the economics of the entire pharmaceutical industry. He invoked that authority only because he was unable to obtain the general data on a voluntary basis. The majority opinion of the Seventh Circuit holds that he may use his authority for that purpose, for two reasons.

First, the majority holds that the Comptroller General's demand for access may be supported by at least one legitimate purpose and is therefore proper even if also motivated by and designed to serve an improper purpose. (App. 34-35.) The legitimate purpose referred to is the Comptroller General's desire to determine Lilly's costs of producing the items purchased under the contracts. However, the cases cited by the majority do not support the broad proposition that an administrative subpoena can be used for an improper purpose if it is also being used for a legitimate purpose. In *Lynn* v. *Biderman,* 536 F.2d 820 (9th Cir. 1976), *cert. denied,* 429 U.S. 920 (1976), the Ninth Circuit actually reached a contrary result, because it enforced an HUD subpoena for the legitimate purpose only and specifically prohibited its joint use for the improper purpose. In *Donaldson* v. *United States,* 400 U.S. 517 (1971), this Court did not find *any* improper purpose in the Internal Revenue Service using a subpoena in an investigation that may lead to criminal prosecution as well as civil liability. Thus, the broad principle of ad-

ministrative investigatory power announced by the Seventh Circuit in this case is without support and has serious ramifications. That holding, if allowed to stand, would sanction abuse of administrative authority by permitting the exercise of authority for an extraneous purpose so long as it is camouflaged with a seemingly proper purpose. Moreover, that holding conflicts with this Court's decision that an administrative summons must be used for a legitimate investigatory purpose and cannot be used to settle a collateral dispute. *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975).

The second and principal basis for the Seventh Circuit's conclusion that the Comptroller General is using his authority for a proper purpose is the Court's determination that the Comptroller General may use the access-to-records statutes in aid of a general research study. (App. 35-40.) In reaching that conclusion, the majority begins by pointing out that provisions of other acts which define the general powers of the Comptroller General do permit him to conduct research studies. Specifically, the majority relies on 31 U.S.C. § 53 (Budget and Accounting Act of 1921), 31 U.S.C. § 60 (Legislative Reorganization Act of 1946), and 31 U.S.C. § 65 (Accounting and Auditing Act of 1950). (App. 36-39.) A mere reading of those statutes, however, reveals that they do not contemplate—much less grant—access to records of private companies. Consequently, to avoid that obstacle, the Seventh Circuit leaps to the conclusion that the access-to-records statutes were later enacted in 1951 in order to facilitate the general powers granted to the Comptroller General by the earlier legislation. But as pointed out by Judge Pell in his dissent, the Comptroller General himself is *not* relying on the statutes defining his general powers in order to justify his demand for access to Lilly's records. (App 51.) In his sworn answers to interrogatories filed in the District Court, the Comptroller General specifically disclaimed any reliance

on those general statutes, and he therefore did not even cite those statutes in his briefs filed with the Seventh Circuit.

Furthermore, the *sole* basis for the majority's conclusion that the access-to-records statutes were enacted to facilitate all of the Comptroller General's powers is a statement by the sponsor of the access-to-records legislation that it would "give the Comptroller General the proper tools to do the job the Congress has instructed him to do." (App. 39.) However, if the statement by the sponsor is read in its entirety, it becomes clear that he was referring to the Comptroller General's "job" of auditing negotiated contracts. Nothing in the legislative history indicates that the Comptroller General was being given access to private companies' records in order to collect data for research studies. Therefore, the majority's conclusion to the contrary is literally without any support. As accurately characterized by Judge Pell in his dissent, the majority opinion "strains to find justification for the Comptroller's broad-sweeping attempt to delve into information in excess of his authority under law." (App. 51.)

Moreover, due to the majority's reliance on the statutes defining the general powers of the Comptroller General, the import of the majority's holding is that the Comptroller General may use his authority under the access-to-records statutes in order to facilitate *all* of the general powers granted to him by those statutes. The breadth and generality of those statutes are almost without limit, which means the Comptroller General may now use his authority under the access-to-records statutes for practically unlimited purposes. In fact, the only purported limitation which the majority could discern is that the *legislative history* indicates that records would not be made public by the Comptroller General in a fashion allowing identification of individual companies. (App. 39-40.) However, an administrative agency's assurance of confidentiality does not validate the ex-

traneous *purpose* for which the agency is demanding access to records in the first place.

The majority opinion not only lacks precedent and reason, but it also conflicts in principle with the decision of the Fifth Circuit in *United States* v. *Humble Oil & Refining Co.*, 488 F.2d 953 (5th Cir. 1974), *vacated*, 421 U.S. 943 (1975), *on remand*, 518 F.2d 747 (1975). Although *Humble Oil* involved different access-to-records statutes, the case is analytically identical to this case. There the Fifth Circuit held that the Internal Revenue Service may not use its summons power under 26 U.S.C. § 7602 in aid of a research project being conducted under the authority of 26 U.S.C. § 7601. In its initial opinion, the Fifth Circuit stated:

> "[T]he Internal Revenue Service is not empowered by section 7602 to issue a summons in aid of its section 7601 research projects or inquiries, absent an investigation of taxpayers or individuals and corporations from whom information is sought. Section 7602 simply cannot be read to give the IRS an unrestricted license to enlist the aid of citizens in its data gathering projects. A contrary conclusion would eviscerate judicial constraints upon the summons power and raise serious constitutional questions. * * *." 488 F.2d at 962-63.

That opinion was vacated by this Court for reconsideration in light of *United States* v. *Bisceglia*, 420 U.S. 141 (1975), in which the Court held that the IRS could issue a "John Doe" summons as part of an investigation of potential tax liability. On remand, the Fifth Circuit reaffirmed its earlier opinion, holding that *Bisceglia* does not authorize the use of summonses for noninvestigative purposes, and that "the provisions of 26 U.S.C. §§ 7601 and 7602 [do not] authorize the IRS to force private citizens to do its research." 518 F.2d at 748-49. Here, on the other hand, the majority holds that the Comptroller General may force private companies to provide data for general research

projects, under statutes not materially different from those involved in *Humble Oil*.

As a practical matter, if the holding in this case is permitted to stand, the confidential books and records of private government contractors will be converted into open-access libraries for use by the Comptroller General. That result is a serious inroad on the constitutional right of privacy extended to businesses by decisions of this Court. *See, Marshall* v. *Barlow's, Inc.*, — U.S. —, 98 S.Ct. 1816 (1978); *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967). The issue is therefore an important one which requires resolution by this Court.

Question 2: Can The Procurement Statutes, Which Grant Access Only To Records That "Directly Pertain To" And "Involve Transactions Relating To" A Negotiated Procurement Contract, Be Properly Construed To Give The Comptroller General The Right To Examine Virtually All Of Lilly's Cost And Pricing Records?

When Congress enacted the access-to-re[illegible] statutes, it did not grant the Comptroller General ac[illegible] ost and pricing records of each private contra[illegible] [illegible]ters into a negotiated procurement contract wit[illegible] the federal government. Instead, Congress limited the Comptroller General's access to those records which *directly pertain* to, and *involve transactions relating* to, the *contract*. 10 U.S.C. § 2313(b); 41 U.S.C. § 254(c). It granted only limited access because, as revealed by the legislative history, the purpose of the statutes was to permit audits of particular negotiated contracts, not audits of or prying into contractors' businesses.

However, the effect of the majority's opinion in this case is to eliminate the words of limitation in the statutes and to allow access to contractor's cost and pricing records regardless of the nature of the contract involved and regardless of whether costs were relevant to the negotiation or performance of the contract. As shown by the facts summarized at pages 8 to 10 of this petition and as found by the District Court (App. 55-57) without dispute from the Court of Appeals, neither the negotiations nor the performance of the contracts involved here were in any way dependent upon, or directly related to, Lilly's costs of producing drugs purchased under the contracts, the profits realized by Lilly, or the methodology by which Lilly establishes its catalog prices. The contract prices were taken or discounted from previously established wholesale catalog prices. Yet the majority opinion holds that Lilly's cost records do "directly pertain to" the contracts. The rationale of the opinion is that since price has some relationship to cost, costs not only pertain to the contracts, but costs "directly pertain" to the contracts. (App. 42.) However costs such as general non-allocable research and development costs on all products and marketing costs definitely are not *directly* pertinent to the contract prices. Further, the majority fails to distinguish between Lilly's catalog prices and the *contract* prices. Some costs may be relevant to Lilly's catalog prices, in the sense that those prices are set in amounts necessary to cover such costs. The contract prices were based simply on a discount from the wholesale catalog prices. The catalog prices were for commercial products sold in substantial quantities to the general public within the exemption provisions of the Truth-In-Negotiation Act [10 U.S.C. § 2306(f)]. Thus, the contracting agency determined the contract prices to be reasonable because they were discounted from prices deemed to be market-tested. The contract prices were not in any way directly related to Lilly's costs. Moreover, since the catalog prices were necessarily established long before

these particular procurement contracts were even contemplated, the methodology by which the catalog prices were set cannot rationally be deemed to directly pertain to these contracts.

The majority's faulty reasoning is compounded by the fact that the majority totally ignores the additional statutory requirement that the records "involve transactions relating to" the contract. If neither the negotiation of a contract nor the contractor's compliance with the performance terms of a contract is in any way dependent on the contractor's costs, as is the case here, then cost records cannot logically or realistically "involve transactions relating to" the contract. That is particularly true in the case of standard commercial products, such as pharmaceuticals, which may have been produced and the costs incurred before the contract with the government even came into existence.

Hence, the effect of the majority opinion is to eliminate the statutory requirements that access be limited to records which *directly pertain* to, and *involve transactions relating* to, the *contract*. If cost records are deemed directly pertinent to these types of contracts, cost records would have to be deemed directly pertinent to *any* type of negotiated contract. The rationale of the majority opinion in fact dictates that result, because the majority substitutes its own standard based simply on whether an item has a significant input in the cost of the product purchased. (App. 44.) That standard will make cost records relevant to any type of a contract, even if the contracting agency was relieved of cost considerations because the product has a market-tested price.

Furthermore, in reaching its result, the majority purports to rely on the decision of the Ninth Circuit in *Hewlett-Packard* v. *United States,* 385 F.2d 1013 (9th Cir. 1967), *cert. denied,* 390 U.S. 988 (1968), but the majority actually

allows broader access than that permitted in *Hewlett-Packard*. The Ninth Circuit's decision was based on a tortured interpretation of the word "contract" in the statutes, and the Ninth Circuit's holding is followed by the majority here without any critical analysis of its merit. (See Judge Pell's dissenting opinion, App. 51-52.) Even the Ninth Circuit recognized that if "contract" is given its usual meaning, cost records cannot be deemed "directly pertinent" to a contract in which costs of production are neither considered during negotiations nor related to the performance terms of the contract. 385 F.2d at 1016. However, those deficiencies aside, the fact remains that *Hewlett-Packard* limited access to records relating to costs of *production*, including direct material, direct labor and overhead. 385 F.2d at 1016. Here, the majority opinion not only grants access to production costs, but it also grants what the *Hewlett-Packard* court refused to grant, *i.e.*, access to general records relating to indirect costs such as research and development, marketing and general administrative costs. Those costs, by definition and in fact here, are incurred without relation to a particular product or contract and cannot as a practical matter be assigned to particular products or contracts. (App. 62.) In no sense can records relating to those costs be deemed directly pertinent to a particular product or contract. Yet, the majority's holding will permit access to practically *all* of Lilly's records, including its most sensitive general research and development records.

In sum, the majority's broad interpretation of the scope of the access-to-records statutes is literally unprecedented. The import of the majority's opinion is that the Comptroller General can demand access to all of the cost records of a private company entering into a negotiated procurement contract with the federal government, regardless of the nature of the contract involved. That holding nullifies Congress' careful effort to grant only limited access to the

records of private contractors. It is an unwarranted exercise in judicial legislation which should be reviewed by this Court, particularly in light of the significant impact which it will have on the privacy of contractors' trade secrets and confidential records.

Question 3: In Reversing Summary Judgment For Lilly, Could The Seventh Circuit Properly Enter Summary Judgment For The United States Even Though The United States Did Not And Could Not Appeal The Nonfinal Order Of The District Court Denying It Summary Judgment, And Even Though Genuine Issues Of Material Fact Exist Concerning Other Claimed Improprieties In The Comptroller General's Purpose In Demanding Access To Lilly's Records?

The majority opinion reverses the summary judgment granted to Lilly and appears to direct the District Court to grant summary judgment for the government on remand, even though the government did not and could not appeal the District Court's nonfinal order denying the government's summary judgment motion. The majority states, "*In granting summary judgment for defendants on remand,* the district court is directed to include the confidentiality subparagraphs contained in defendants' proposed order previously submitted below." (App. 51; emphasis added.) The majority makes that direction apparently due to its determination that the one purpose of the Comptroller General's demand (the research study) is proper, and that the *categories* of records described on the face of his demand do fall within the scope of the access-to-records statutes. However, material issues of fact still remain in this case which, if proven at trial, would render the Comptroller General's demand illegal.

The most important remaining issue concerns other purposes of the Comptroller General's demand for access to

Lilly's records As shown by the facts summarized at pages 6 to 8 of this petition and by the findings of the District Court (App. 57-61). Lilly presented documented evidence in opposition to the government's summary judgment motion which shows that the GAO intends to provide the pharmaceutical companies' cost and profit data to the Subcommittee on Monopoly of the Senate Select Committee on Small Business, which in turn intends to expose that data to the public in a manner identifying individual drug items and individual manufacturers. That improper purpose was not the basis for the District Court's entry of summary judgment for Lilly, because the Comptroller General disputes that he has such a purpose. It was, however, an implicit basis for the District Court's denial of summary judgment for the government. Therefore, Lilly is entitled to a trial on that issue. Nothing in the Seventh Circuit's opinion would allow the Comptroller General to use his access-to-records authority for such a purpose, and the government's so-called protective order would not preclude the release of data to the Senate Subcommittee. This Court has held that Congress itself does not have authority to obtain private data in order to expose it publicly for the sake of exposure, *Watkins* v. *United States,* 354 U.S. 178, 200 (1957), and an agency of Congress such as the GAO necessarily does not have such authority either.

Another remaining factual issue is whether the Comptroller General will exceed the scope of his authority once access to Lilly's records is granted. More specifically, the issue is whether the Comptroller General is in reality seeking access to *all* of Lilly's records. The evidence submitted by Lilly in opposition to the government's summary judgment motion reflects the fact that the GAO cannot identify with any meaningful precision the specific records of Lilly which are encompassed by the categories of records described in the Comptroller General's demand letter. Consequently, the GAO has admitted on the record that it cannot identify any records of Lilly to which it does *not* want access! The GAO cannot even put any time constraints on the records which it wants to examine. In effect, the GAO wants access to all of Lilly's records in order to determine which records it has a right to examine. Therefore, a serious factual issue exists as to whether the Comptroller General actually wants to examine records which do not fall within the scope of the access-to-records statutes, even if his demand is deemed proper on its face.

Although Lilly argued in both its principal brief and its petition for rehearing that these factual issues preclude summary judgment for the government even if the summary judgment for Lilly were reversed, the Seventh Circuit nevertheless refused by a divided court to change its opinion. The Seventh Circuit thus has acted contrary to this Court's holding in *Fountain* v. *Filson,* 336 U.S. 681, 683 (1949), that summary judgment should not be granted to an appellant on appeal even though a summary judgment for the appellee is reversed, if genuine issues of fact still remain in the case. Furthermore, the implication of the Seventh Circuit's disposition of this case is that the Comptroller General can use a facially proper access demand as a key to unlock the doors to all of a contractor's records, without the contractor being able to challenge the propriety of the demand on available grounds. Consequently, this Court should at least accept review of this issue so that the Court may exercise its power of supervision and vacate the Seventh Circuit's summary denial of Lilly's right to a trial.

CONCLUSION

The Seventh Circuit's majority opinion radically expands the Comptroller General's authority under the access-to-records statutes, permits him to use statutes designed for one limited purpose as an excuse to gain an extraneous objective, and substantially impairs the right of government suppliers to maintain a reasonable expectation of privacy in their confidential records. Accordingly, a writ of certiorari should issue to review the decision of the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-1280
ELI LILLY & Co.,

Plaintiff-Appellee,

v.

ELMER B. STAATS, Comptroller General of the United States, and UNITED STATES,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana.
No. IP75-72-C
Cale J. Holder, *Judge.*

ARGUED NOVEMBER 4, 1977—DECIDED APRIL 12, 1978

Before CUMMINGS and PELL, *Circuit Judges,* and CAMPBELL, *Senior District Judge.*•

CUMMINGS, *Circuit Judge.* In this action brought under 28 U.S.C. §§ 1331, 1332 and 1337, plaintiff sought declaratory and injunctive relief with respect to the United States Comptroller General's request to examine certain of its books and records. According to the complaint, plaintiff, a manufacturer of drug products, was awarded a contract with the Veterans Administration in January 1974 and six contracts with the Defense Department in 1973. The contracts involved pharmaceutical products widely sold to plaintiff's commercial customers at its standard catalog prices. However, each product sold to the Government was sold below plaintiff's catalog price and at "a price lower than the price given any other person or entity."

• Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

The complaint also alleged that the contracts were awarded to plaintiff in response to bids solicited by the United States. Plaintiff was assertedly awarded the contracts because its bids were the lowest submitted to the Government.

In August 1974, the Comptroller General wrote plaintiff requesting that it make available for examination by the General Accounting Office (GAO) which he heads:

> "all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests."

This request was pursuant to 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c).[1] According to the complaint, the Comptroller General's request exceeded his statutory authority and covered confidential business records whose disclosure would benefit plaintiff's competitors. Therefore, plaintiff sought a declaratory judgment that the Comptroller General's request exceeded his legal authority and sought a permanent injunction prohibiting him from examining the following documents:

> "(a) Lilly records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs,
>
> "(b) Lilly records supporting prices charged to the Government, and
>
> "(c) other Lilly records containing information for use by the Comptroller to review the reasonableness of the Lilly contract prices."

Two months after the filing of the complaint, the district court permitted the United States to intervene. On the

[1] In his letter, the Comptroller General also referred to 31 U.S.C. §§ 53 and 67 but does not "base [his] claim of right" to examine the records on those statutes (App. 63a).

following day, the United States filed an answer and counterclaim. The counterclaim alleged that each of the contracts contained the following standard clauses:

> "(b) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this Contract, or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.
>
> "(c) The Contractor further agrees to include in all his subcontracts hereinunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under the subcontract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor involving transactions related to the subcontract. The term 'subcontract' as used in this clause excludes (1) purchase orders not exceeding $2,500 and (2) subcontracts in purchase orders for public utility services at rates established for uniform applicability to the general public."

The counterclaim asserted that plaintiff's refusal to permit the Comptroller General to examine the records in question contravened 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) and the contractual clauses. Therefore, the Government sought declaratory and injunctive relief in its favor.

Subsequently, the United States filed a motion for summary judgment on its counterclaim and the plaintiff filed a motion for summary judgment on its complaint and on

the Government's counterclaim. Finally, the Comptroller General filed a motion for summary judgment.

After hearing oral arguments and considering the briefs, pleadings, affidavits, answers to interrogatories and depositions on file, the district court granted plaintiff's motion for summary judgment and denied all relief requested by the defendants. We reverse.

In granting summary judgment for plaintiff, the district found in part as follows: The seven contracts in question were "negotiated fixed-price contracts." Six of them were awarded to the plaintiff, the sole offeror, on the basis of a comparison of its offered prices to its standard catalog prices. In each instance, the contract price was lower than the catalog price. Plaintiff was awarded the seventh contract because acceptance of the only other company's offer "was precluded by the Buy-American Act" (41 U.S.C. §§ 10a-10c) and because plaintiff's "offered price was [considered] fair and reasonable based on the competition received." Since the contract prices were identical to the prices initially offered by Lilly, the prices were not actually negotiated but were fixed prices "not based on any type of 'cost-plus' formula."

The district court found the contractual negotiations and performances were not "in any way dependent upon, or directly related to, Lilly's costs of producing the drugs purchased under the contracts, the profits realized by Lilly, or the methodology by which Lilly establishes its catalog prices for standard commercial articles." The court also found that the request for these records was initiated in 1971 by the Chairman of the Subcommittee on Monopoly of the Senate Select Committee on Small Business during hearings on the status of competition in the pharmaceutical industry. Plaintiff and five other pharmaceutical companies participated in phase I of the GAO's study of their manufacturing processes and marketing policies. However, in response to phase II of the GAO's study, they were unwilling to give the Comptroller General cost and pricing records on individual products purchased by the Government under specified contracts. Consequently, the Comptroller General sent the foregoing written request in August 1974 to plaintiff and the other five drug companies

that engaged in his phase I. These letters were sent after representatives of the GAO conferred with the Chairman of the same Senate Subcommittee.

The court found that the Government's purpose was not to audit plaintiff's negotiations and performance of the seven contracts in question, but was as disclosed in response to one of plaintiff's interrogatories as follows:

> "The sole purpose of the requested examination of Lilly's books and records is not to audit Lilly's negotiations and performance of the contracts involved in this suit. Rather, the purpose of the requested examination, as presently contemplated, is to review contract pricing by the Government's suppliers, including Lilly, of drug items to determine the adequacy of the protection afforded the Government by the negotiation techniques used by the procuring agencies. Accomplishment of this objective is contingent upon GAO's ability to gain access to the records needed to (1) ascertain the nature of the activities for which the drug firms are incurring costs, (2) to ascertain and verify the extent to which the costs of these activities affect the prices paid by the Government for items procured under the specified negotiated contracts, and (3) to determine the bases of firms' pricing considerations for the products and, particularly, the applicability of these considerations to any Federal procurement of the products involved."

Another purpose of the Government's study was "to have a better public unerstanding and legislative understanding of the economics of the industry."

The court found that plaintiff's major items of cost in producing and marketing its pharmaceutical products (including those sold to the Government)

> "are general administrative costs, marketing costs, and research and development costs. These major items are not assigned or allocated to individual pharmaceutical products or sales contracts under Lilly's accounting system and no generally accepted accounting principle exists for making such an

allocation of those types of indirect costs to specific products or specific contracts."

The court's final finding was that the records sought by the Comptroller General contain confidential business information and secrets of plaintiff which, if made public, would cause plaintiff irrevocable competitive injury.

Based on his 25 findings of fact, the district judge concluded that the Comptroller General's demand exceeded his statutory and contractual authority because his purpose was to conduct a research study on the economics of the entire pharmaceutical industry, whereas he was given inspection authority only to permit audits of the negotiations and performances of particular contracts awarded after negotiation. The court also concluded that the Comptroller General was not authorized to examine these documents because they do not directly pertain to, and do not involve transactions relating to, these seven contracts. In addition, the court held that the Comptroller General's demand was too broad because it encompassed records relating to the methods by which plaintiff established its standard catalog prices which were set without regard to these contracts and encompassed records of costs which plaintiff does not assign or allocate to particular products or contracts. Therefore, Judge Holder decided that the Comptroller General could only examine plaintiff's contract files on these seven contracts and other records which would enable him to determine:

> "(a) Lilly's standard catalog prices for the products purchased under the specified contracts;
>
> "(b) That the prices of the products purchased were based upon established catalog or market prices of commercial items sold in substantial quantities to the general public; and
>
> "(c) That the prices received by the government under the contracts were equal to or less than the catalog prices."

The contractual clauses contained in each of the contracts and set out at pages 3-4 *supra* were pursuant to 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), which respectively provide as follows:

> "*Examination of books and records of contractor*
>
> "(b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract" (10 U.S.C. § 2313(b)).
>
> "*Negotiated contracts—Requirements Examination of books, records, etc., of contractors; time limitation.*
>
> "(c) All contracts negotiated without advertising pursuant to authority contained in this chapter, chapter 11C of Title 5, chapter 10 of Title 40, and chapter 11 of Title 44 shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts" (41 U.S.C. § 254(c)).

Both of the above statutes are essentially alike. The former applied to the six Defense Department contracts, and the latter to the Veterans Administration contract. It first should be noted that the statutes are limited to negotiated contracts, but plaintiff has admitted that these were negotiated contracts (Br. 58). Next, the statutes permit access only to the Comptroller General and his representatives, obviously referring to employees of the GAO which he heads, but do not prohibit the GAO from transmitting information gleaned from the records to appropriate governmental sources. The right of access exists until three years after final payment, not asserted as a stumbling block in the present case. Finally, in the case of 10 U.S.C. § 2313(b), the records to be examined must "direct-

ly pertain to, and involve transactions relating to, the contract or subcontract'' or, in the equivalent language of 41 U.S.C. § 254(c), the records must be ''directly pertinent'' and must involve ''transactions related to such contract or subcontracts.'' Together with the issue of whether the Comptroller General's requests were, as the district court found, motivated by an improper purpose, the question whether the information requested fits within the language of these two clauses forms the prime focus of this appeal.

I. *The Comptroller General's Purpose*

Plaintiff's argument that the Comptroller General's demand exceeds his authority because he is using his powers for an improper purpose is based on the principle of administrative law that power to investigate can be exercised only for the purpose for which the authority was granted (Br. 19). See 1 K. Davis, *Administrative Law* § 3.10.[2] Relying on the district court's conclusion that the Comptroller General in this case is using his authority for the purpose of conducting a research study of the economics of the entire pharmaceutical industry, plaintiff suggests that such a study is an improper purpose and therefore the demand violates Professor Davis' principle of administrative law.

Even assuming that the contractual powers of the GAO, which is a unique independent agency within the legislative

[2] Stated more precisely, the principle is that "the purpose of the investigation must be to get information to fill a legitimate need of the agency." 1 K. Davis, *Administrative Law* § 3.10; see *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509. The difference between this statement of the principle and the one offered by plaintiff is that this statement apparently would deem proper an investigation aimed at evidence relevant to any of an agency's many purposes while plaintiff's statement might limit the use of the investigatory power to the purposes of the agency that prompted the grant of the investigatory power, if a limited purpose can be identified. Because of our conclusion that defendant official's investigation fits within the purposes that prompted the grant of the investigatory power, we need not choose between the two potentially conflicting statements of the principle as they apply to the unique contractual powers and statutory scheme of the GAO. Cf. Morgan, The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President, 51 *N.C.L. Rev.* 1279, 1364 (1973).

branch of Government (see Cibinic & Lasken, The Comptroller General and Government Contracts, 38 *Geo. Wash. L. Rev.* 349, 349-350 (1970)), are subject to the same restraints as those on the subpoena powers of administrative agencies to which plaintiff refers, the Comptroller General's demand was not outside the purpose for which his investigatory authority was granted for two reasons. First, although the district court did find that one of the Comptroller General's purposes was to conduct a research study, it did not explicitly find that such a study was the only purpose of the information demand. Instead, it apparently recognized that one of the Comptroller General's purposes was to determine the costs of producing the items purchased in the contracts. See Finding of Fact 21, App. 137a. Given that the Comptroller General thus had more than one purpose in mind, another principle of administrative law becomes relevant. As the Ninth Circuit stated in *Lynn v. Biderman*, 536 F.2d 820, 826 (1976), certiorari denied, 429 U.S. 920, that principle is that ''it is not * * * a ground to deny enforcement of a subpoena that it is being employed for a wrongful purpose if there is also a legitimate purpose for the subpoena.'' See also *Donaldson v. United States*, 400 U.S. 517. Since (as we discuss in Part II *infra*) the cost elements of the items purchased are legitimate area of inquiry under 10 U.S.C. § 2313 and 41 U.S.C. § 254, the Comptroller General's investigation is motivated by at least one legitimate purpose and therefore is a proper investigation under principles of administrative law.

A second reason why the Comptroller General's investigation is not motivated by an improper purpose is that even if the only purpose of the investigation were to conduct the research study, that purpose may be proper given the spectrum of statutes outlining the duties of the Comptroller General. This statutory spectrum is best outlined by noting the provisions cited by the Comptroller General in making his demand. In his written request to plaintiff of August 26, 1974, the Comptroller General stated his review of procurement of drugs by agencies of the federal government was being made pursuant to 31 U.S.C. §§ 53 and 67 (as well as under 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c)). Although his Answer to plaintiff's Interroga-

tory 10 denied that 31 U.S.C. §§ 53 and 67 were the basis for his "claim of right to have access to and examine" plaintiff's books and records, the answer did not constitute an abandonment of reliance on those provisions as spelling out his duties, and therefore his legitimate purposes, as opposed to his specific powers to obtain information. Therefore, we look to those and other related provisions to see if they provide a legitimate purpose for the present survey.

31 U.S.C. § 53 provides:

> "*Investigations and reports by Comptroller General*
>
> "(a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.
>
> "(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.
>
> "(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

> "(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.
>
> "(e) He shall furnish such information relating to expenditures and accounting to the Office of Management and Budget as it may request from time to time."

This statute plainly authorizes the detailed scope of inquiry into underlying records that the Comptroller General is attempting here (see Cibinic & Lasken, *supra,* at 387), and it does so in connection with public reports. The more difficult question of whether the statute contemplates such an inquiry into the records of private contractors as well as government agencies can be answered in the affirmative by noting the significant amount of public funds spent in contracts with private firms (see *id.; Fullilove v. Kreps,* 443 F.Supp. 253, 258 (S.D. N.Y. 1977) ($120 billion awarded annually)); and then recognizing that Section 53 deals with "*all* matters relating to the receipt, disbursement, and application of public funds" (emphasis added).[3] Thus it is our view that even though in 1921 when it enacted Section 53 Congress gave the Comptroller General significant powers of investigation only with respect to governmental records,[4] its language left him with a general responsibility to oversee the Government's spending as a whole, which necessarily included disbursements to private contractors. The fact that Congress waited until the 1950's (when dealings with or concern over private contractors may have increased) to give the Comptroller General specific investigatory power into private contracts does not vitiate the conclusion that at all times the terms of the legislation gave the Comptroller General the responsibility to oversee all expenditures.

Since 31 U.S.C. § 67, also relied upon in the Comptroller General's requesting letter, deals with duties of govern-

[3] But see Cibinic & Lasken, *supra,* at 387.

[4] See 31 U.S.C. § 54.

mental agencies, it is not germane to this case. However, 31 U.S.C. §§ 60 and 65 lend further support to the Comptroller General's request because they also outline broad investigatory responsibilities. Thus Section 60 directs the Comptroller General to make an expenditure analysis of each federal executive agency which in his opinion "will enable Congress to determine whether [as here] public funds have been economically and efficiently administered and expended" whereas Section 65 contains the following Congressional declaration of policy as to accounting and auditing:

> "*Congressional declaration of policy*
>
> It is the policy of the Congress in enacting this chapter that—
>
> "(a) The accounting of the Government provide full disclosure of the results of financial operations, adequate financial information needed in the management of operations and the formulation and execution of the Budget, and effective control over income, expenditures, funds, property, and other assets.
>
> "(b) Full consideration be given to the needs and responsibilities of both the legislative and executive branches in the establishment of accounting and reporting systems and requirements.
>
> "(c) The maintenance of accounting systems and the producing of financial reports with respect to the operations of executive agencies, including central facilities for bringing together and disclosing information on the results of the financial operations of the Government as a whole, be the responsibility of the executive branch.
>
> "(d) The auditing for the Government, conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which accounting and related financial reporting fulfill the purposes specified, financial transactions have been consummated in accordance with laws, regulations or other legal requirements, and adequate internal financial control over operations is exercised, and afford an effective basis for the settlement of accounts of accountable officers.
>
> "(e) Emphasis be placed on effecting orderly improvements resulting in simplified and more effective accounting, financial reporting, budgeting, and auditing requirements and procedures and on the elimination of those which involve duplication or which do not serve a purpose commensurate with the costs involved.
>
> "(f) The Comptroller General of the United States, the Secretary of the Treasury, and the Director of the Office of Management and Budget conduct a continuous program for the improvement of accounting and financial reporting in the Government."

Although it might be possible to argue that such general descriptions of responsibilities do not help define a proper purpose under a specific statute (see note 2 *supra*), that argument is not persuasive when as here the specific statute was enacted for the purpose of implementing the general responsibilities that had been outlined in the earlier legislation. That the access-to-records provisions in Sections 2313 and 254 were enacted to help implement Congress' listing of responsibilities in Sections 53, 60 and 65 is clear from the statement before the House of Congressman Hardy, sponsor of the legislation, that one of the major reasons for the legislation was "to give the Comptroller General the proper tools to do the job the Congress has instructed him to do." 97 Cong. Rec. 13198; see also *id.* at 13200; Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts Before a Subcommittee of the Committee on Government Operations, 89th Cong., 1st Sess. 146 (1965) (statement of Herbert Rorback).

Thus even if a research study had been the Comptroller General's sole purpose, the statutory scheme outlining his powers and the legislative history of those statutes indicate that this request was authorized. While this interpretation of the statutes would give the Comptroller General broad supervisory responsibilities, the legislative history of those statutes does reflect at least one limitation on the powers

available to implement those responsibilities: a restriction against making records disclosed under the access-to-records provisions public in a fashion allowing identification of individual companies. Disclosure of information about individual companies in a manner that would aid competitors apparently was not contemplated by the sponsors of Sections 2313 and 254. See 97 Cong. Rec. 13197. With that limitation, the applicability of which the Comptroller General has recognized (see Part IIC *infra*), we conclude that his request was properly motivated. Accord, *Hewlett-Packard Company v. United States,* 385 F.2d 1013, 1016 (9th Cir. 1967), certiorari denied, 390 U.S. 988; *Merck & Co., Inc. v. Staats,* Civil Action No. 74-1447 (D. D.C. Aug. 12, 1977) (slip op. 4).

II. *The Comptroller General's Powers*

That the Comptroller General was acting in accord with a legitimate purpose would not alone be sufficient to justify his request in the absence of a statute or contract authorizing the actions he took in requesting the information. Plaintiff's second line of offense is that the inspection sought was not authorized by the statutory or contractual language (quoted at pages 7-8 and 3-4 *supra*). Those clauses gave the Comptroller General the "right to examine any pertinent books, documents, papers and records of the Contractor involving transactions related to this contract." His letter tracked that language but added

> "which include, but are not limited to, (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests."

This language was derived from the request approved in *Hewlett-Packard, supra.*

The few courts that have interpreted this language have reached differing conclusions. Judge Holder's opinion below gave the statutory language its narrowest reading,

allowing the Government to obtain information only to determine Lilly's catalog prices for the purchased items, to determine whether the Government's purchase price was based on the catalog prices of items sold in substantial quantities to the general public, and to determine whether the prices paid by the Government were equal to or less than the catalog prices (App. 142a). A somewhat less restrictive interpretation was offered in *Bristol Laboratories v. Staats,* 428 F.Supp. 1388 (S.D. N.Y. 1977). In that case, which grew out of the same set of inquiries by the Comptroller General as this case, the district court limited the Comptroller General to information that Bristol had agreed to offer: manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision); manufacturing overhead (including plant administration, production planning, warehousing, utilities and security); royalty expenses; and delivery costs. The court apparently accepted Bristol's argument that research and development, marketing and promotion, and distribution and administration costs should not be disclosed because they are "too remote to the contracts and have only the most general relation, if any, to the prices charged." *Id.* at 1389-1390. The *Bristol* court's conclusions recently were accepted by Judge Bryant in *Merck & Co., Inc. v. Staats,* Civil Action No. 74-1447 (D. D.C. Aug. 12, 1977).[5] Although plaintiff and the *Merck* court both sought to read it narrowly, we view the Ninth Circuit's opinion in *Hewlett-Packard Company v. United States,* 385 F.2d 1013 (1967), certiorari denied, 390 U.S. 988, as taking a considerably broader view. While it is true that the district court's order affirmed by the Ninth Circuit in *Hewlett-Packard* went no further than declaring that the Comptroller General could examine any records relating to "the cost of producing the items" furnished under the contracts, the scope of the order in that case and, more importantly, the reasoning of the reviewing court do not seem to be significantly different from the Comptroller General's position here. Plaintiff's observation that the *Hewlett-Packard* order did not expressly include reference to costs not assigned by the firm

[5] We have been advised by the Government that both *Bristol* and *Merck* are being appealed.

to individual products and similar general cost and pricing information is not persuasive both because the order included overhead costs, a type of cost that is not always assignable to individual products, and because the rationale of the Ninth Circuit's opinion, which emphasized the appropriateness of inquiry into the procurement process as a whole, was not limited to disclosure of the specific costs requested by the Comptroller General in that particular case.

A. *The Meaning of the Statutes*

At least as applied to the pharmaceutical industry, we think that the broad reading of *Hewlett-Packard* is the reading most consistent with the plain meaning of the statutory language and with the legislative history. In interpreting the statutory language, as the Comptroller General contends, "it is hard to imagine anything more directly related to a contract than the cost of producing the items covered by it or the matters going into the makeup of the price" (Reply Br. 9). Accord, *Hewlett-Packard Company v. United States, supra,* at 1016. That such costs can be "directly pertinent" to the contract even though they are not all assigned by the company to the contract or to the product can be explained, at least as applied to contracts with pharmaceutical companies, by the fact that the manufacturing and distribution costs of individual pharmaceutical products have been estimated to constitute as little as 9 per cent of the products' sale prices. See Rucker, Public Policy Considerations and the Pricing of Prescription Drugs in the United States, 4 *Int. J. Health Services* 171, 173 (1974). Although it might be possible to argue in other industries that costs such as research and development have such a small impact that they are not "directly pertinent" to the contract and its price, research and other costs not immediately attributable to one product form such a large portion of the costs of a pharmaceutical product that their import to such a contract seems inescapable.

In response to plaintiff's argument that including these items would not give full effect to the limits on disclosure

implied by the use of the word "directly," without disputing that "directness" is a difficult concept to define,[6] it should be noted that costs such as research and development at the least appear to have a logical, causal and consequential relationship to a portion of the price of the products purchased by the Government. Further, contrary to plaintiff's contention, such costs are not "remote" within the established definitions of that term in relation to at least a portion of the price because their inclusion in the price of the product is not unforseeable once the costs are incurred, nor is their impact on a part of the price significantly altered by any intervening cause. See generally W. Prosser, *Law of Torts* § 42 (4th ed. 1971). If such costs constituted a minimal share of the total price of the contract, it might be difficult to argue that these costs are "directly pertinent" to the price of the contract as a whole, but that issue does not seem to be presented on these facts. Thus in relation to the contract as a whole, these costs fit within the common and legal understandings of "directly pertinent." The mere fact that, as plaintiff asserts, it does not or even could not allocate costs such as research and development to an individual contract does not undercut the proposition that those costs are directly pertinent to an individual contract but merely indicates that they are directly pertinent to more than one individual contract.

While plaintiff did not offer this Court any precise alternate manner of interpreting the phrase "directly pertinent," its argument seems to limit "directly pertinent" to an inquiry into what issues were negotiated at the time of contracting (see *e.g.*, Br. 48-49). This interpretation apparently is based on the assumption that if the Government did not negotiate about an issue, it thereby considered it not to be pertinent. Such an interpretation might be reasonable if the statutory standard were that

[6] See, *e.g.*, W. Prosser, *Law of Torts*, 263-267 (4th ed. 1971) (discussing direct cause in tort law); G. Gunther, *Cases and Materials on Constitutional Law*, 626-628 (8th ed. 1970) (discussing direct burdens on interstate commerce); W. Gellhorn & C. Byse, *Administrative Law Cases and Comments*, 201-211 (6th ed. 1964) (discussing direct injury as limit on standing).

the information must be "directly pertinent" to the negotiation, but the standard is "directly pertinent" to the contract and plaintiff offers no reason to suppose that there would be a reason to negotiate about each item that might have a significant effect on the seller's cost or performance. In fact, plaintiff's proposed method of defining pertinence by analyzing what was negotiated would not serve even its interests in the long run because such a standard once adopted would simply encourage the Government to protract the negotiations by raising any conceivable issue about which it later might want information and would allow the Government to make an issue pertinent simply by introducing it in the negotiations.

In the final analysis, plaintiff's suggested interpretation of examining what was negotiated rests on its conclusion that Sections 2313 and 254 were designed only to uncover "improprieties in the negotiation of Government contracts" (Br. 43, quoting 97 Cong. Rec. 13377). However, our view of the legislative history, outlined in the following section, is that controlling fraud was not the only purpose of the legislation and that another concern of the legislators was with excessive pricing. Given this latter purpose and our view of the meaning of "directly pertinent," the access-to-records clauses should be interpreted so that an item is "directly pertinent" to a contract if it is a significant input in the cost of the product purchased in the contract.

B. *The Legislative History of the Statutes*

Despite its brevity, the legislative history of Sections 2313 and 254 lends support to the Comptroller General's contention that an inquiry into whether costs are excessive was intended by the drafters of those bills. The sponsor of the legislation, Congressman Hardy, made this added purpose apparent when he explained that under its new authority the GAO would "find [whether] the rates [prices] were excessive" and that in addition to deterring improprieties the new authority also would deter "wastefulness in the negotiation of contracts." 97 Cong. Rec. 13198. Consistent with this purpose, Congressman Hardy recognized the GAO's authority "to look behind the rate [price] which

had been established." *Id.*[7] Although no emphasis need be placed upon it, it is instructive to note that the GAO's consistent interpretation of the access-to-records clauses, entitled to weight as the administrative interpretation of the statute (see J. McBride & T. Touhey, *Government Contracts* § 2.20) and as an interpretation voiced before Congress and not changed by it (cf. *Kay v. Federal Communications Commission*, 443 F.2d 638, 646 (D.C. Cir. 1970)), has been that "Congress intended the GAO to examine the books and records of the contractor to make certain that the Government was getting a fair deal out of negotiated contracts." Hearings on Comptroller General Reports to Congress on Audits of Defense Contracts Before a Subcommittee of the Committee on Government Operations, 89th Cong., 1st Sess. 147 (1965) (statement of Robert Keller); see *id.* at 44 (statement of Comptroller General Joseph Campbell); 115 Cong. Rec. 25801; J. McBride & T. Touhey, *supra*, § 7.140[1] (citing unpublished Comptroller General opinions).

Plaintiff's objections to this interpretation of the legislative history fall into two groups. The first group of objections disputes that Congress intended an inquiry into wastefulness by noting gaps in the legislation that allegedly are inconsistent with such an intent and later legislation from which the opposite intent could be inferred. Thus plaintiff argues that had Congress' concern been with wastefulness and not just fraud, it would have extended the scope of the legislation to advertised contracts as well. However, it is not illogical to assume that Congress simply felt the problem of waste was more acute in negotiated contracts (see generally Cibinic & Lasken, *supra*, at 387-388); in any event plaintiff's argument proves too much because it would still have some application even if as

[7] Lilly purports to distinguish these statements because they were made at least in part in reference to specific examples of proposed investigations that do not anticipate fully the unique circumstances involved in this investigation. However, the current investigation fits within the spirit and facial language of those statements, and in the absence of a persuasive logical difference between the examples discussed and the instant case it is unreasonable to limit the Comptroller General's power to cases precisely fitting the examples offered by Congressman Hardy to explain the general powers conferred.

plaintiff contends Congress was only concerned with fraud. Similarly, plaintiff's argument that Congress could not have intended to inquire into wastefulness in contracts such as the one here in which the drugs were supplied to the Government "at a fixed price at or below the wholesale market price" (Br. 35) ignores the fact that the information sought by the Government may show that the prices it paid were nevertheless much too high. It should be noted that this same situation was present in *Hewlett-Packard* and not found determinative. See 385 F.2d at 1014.

Although plaintiff relies on subsequent history to restrict the Comptroller General's power, it is improper to resort to such materials when, as here, the relevant statutory provisions taken together plainly support the Government. *Haynes v. United States,* 390 U.S. 85, 87 n. 4; *Wisconsin Cheeseman, Inc. v. United States,* 388 F.2d 420, 423 (7th Cir. 1968). In any event, the failure to pass S. 2268 (94th Cong., 1st Sess.) giving the Comptroller General access to records in connection with profit studies, which plaintiff uses to argue that Congress disapproves of such power, could easily mean that Congress ultimately considered he already had sufficient inspection powers to justify requests such as the one at issue here. Cf. *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 382 n. 11.

Finally, plaintiff argues that the access-to-records authority must be "construed in harmony" with other federal procurement laws (Br. 47), specifically the Truth-in-Negotiation Act (10 U.S.C. § 2306) and the Renegotiation Act (50 U.S.C. App. § 1216). Apparently the argument is that because the other federal procurement laws specifically exempt contracts such as the one here on the ground that they are based on established catalog prices, therefore the access-to-records clauses must be read similarly. However, even assuming that other expressions of Congress at different times have any relevance in interpreting legislation (see *Benevento v. United States,* 461 F.2d 1316, 1322 (Ct. Cl. 1972), certiorari denied, 409 U.S. 1038), such relevance is not persuasive when as here the legislation clearly has no exemption provision. In fact, it can be argued that the proper inference to be drawn, if any, is that since Congress

in the Renegotiation Act demonstrated its ability to draft a specific exemption provision, its failure to do so in the access-to-records legislation indicates that no such exemption was intended. See *United States v. Columbia River-Longview Bridge Co.,* 99 F.2d 287, 289 (9th Cir. 1938). Although as plaintiff submits there may be some anomaly in requiring disclosure here when disclosure might not be required under other procurement statutes, it would be even more anomalous to deny this disclosure to the Government in this case, in which it has contracted for disclosure, when it is likely that the Government could compel the same disclosures from plaintiff in discovery proceedings even in litigation in which plaintiff is not a participant. See *United States v. International Business Machines,* 66 F.R.D. 186 (S.D.N.Y. 1974).

Beyond these attempts to infer legislative intent, plaintiff's second type of objection seeks to prove legislative intent by relying on the discussion of the access-to-records legislation in the Congress and focusing specifically on Congressman Hoffman's insertion of the word "directly" into the legislation. However, plaintiff can point to no language in the legislative history to indicate that the word "directly" is to be given a meaning different from its normal interpretation discussed *supra.* In offering the amendment, Congressman Hoffman said only that his purpose was "to limit the snooping that may be carried on under this bill which we do not have the votes to defeat." 97 Cong. Rec. 13377. Significantly, Congressman Hardy did not oppose the amendment and it was passed without opposition. Of course "snooping" was left undefined[8] and the extent to which it was to be limited was not explained. In our view the present request cannot be deemed snooping because,

[8] Attempting to cull the meaning of the word "snooping" from other comments by Congressman Hoffman during the Congressional debate, all of which were made in reference to other proposed amendments, even assuming the relevance of such comments, is a difficult task because the Congressman voiced so many concerns that there is no logical way to identify which one or ones he regarded as the "snooping" that he sought to limit. In addition to discussing the scope of the inquiries, for example, he also attacked the time involved in any inquiry (97 Cong. Rec. 13373) and the manner in which the Comptroller General's representatives conducted the inquiries (97 Cong. Rec. 13377).

like the information requested in *Hewlett-Packard*, these costs "directly pertain to, and involve transactions related to, those contracts" (385 F.2d at 1015) and are therefore appropriate subjects for inspection. Thus at the very least the legislative history of Congressman Hoffman's amendment provides no basis to depart from the meaning of "directly pertinent" derived from an interpretation of that phrase and from an analysis of the legislative history of the legislation as a whole.

C. *Remaining Issues*

Apart from the statutory wording and its legislative history, plaintiff offers three further arguments aimed at limiting or striking the Comptroller General's request. First, plaintiff argues that the access-to-records clauses must be construed narrowly to avoid conflicting with Lilly's right to privacy under the Fourth Amendment. But even assuming that the consent given by the plaintiff when the contract was signed could be deemed ineffective because the consent was required by the Government (but see *United States v. Biswell*, 406 U.S. 311, 316), the administrative law cases relied upon by plaintiff itself indicate that plaintiff's Fourth Amendment rights are protected if the requests are, as here, "reasonably related" to an investigation within the jurisdiction of the requesting agency. *Civil Aeronautics Board v. United Airlines*, 542 F.2d 394, 401-402 (7th Cir. 1976); see *Equal Employment Opportunity Commission v. University of New Mexico-Albuquerque*, 504 F.2d 1296, 1303 (10th Cir. 1974).

Related to this privacy argument is a second argument that plaintiff would suffer competitive injury upon disclosure of the requested information. However, in support of the motion of the United States for summary judgment, the first affidavit supplied by the GAO states that "GAO does not intend to identify individual drug firms or specific products in any report issued to the Congress" and that no "information other than that pertaining to a contractor's government business would appear in a report issued by GAO or otherwise be made public." The second GAO affidavit provides in part as follows:

> "3. I [Gregory Ahart] know that GAO intends that any report made using data obtained from Lilly will be made so that identification of Lilly or its products is not reasonably possible and Lilly will be afforded a reasonable period of time before release of such report to examine and comment upon it.
>
> "4. I know that GAO intends to use its best efforts including resort to judicial remedies, if appropriate, to prevent the release of any data obtained from Lilly to an individual Member of Congress or to any person or agency outside GAO.
>
> "5. I know that GAO intends that the only request for data obtained from Lilly which would be honored by GAO would be an official written request submitted by either House of the Congress or a Chairman of a House, Senate or Joint Committee having jurisdiction over the subject matter of the proposed study and then only to the extent authorized by and directed by law. I know that GAO intends that such a request will not be honored until GAO has first notified Lilly and this Court that a request has been made.
>
> "6. To the best of my knowledge and belief, GAO has never honored or agreed to honor any request for confidential costs and related pricing data pertinent to specified individual drug firms or products."

In the court below, the Government submitted a proposed order granting it summary judgment but providing that the information obtained from plaintiff "shall be held in confidence and shall not be provided or otherwise made available by the Comptroller General to any person or agency outside the General Accounting Office except as provided" in two subsequent subparagraphs. The first of those subparagraphs provided that after receiving plaintiff's comments the GAO could make such data available to outsiders "in such a way that any direct or indirect identification of Lilly * * * is not reasonably possible." The next subparagraph provided that after seven days' notice to plaintiff the Comptroller General could

submit information obtained from plaintiff in response to an official written request of either House of Congress or any Congressional Committee or Joint Committee having jurisdiction over the subject matter of the GAO's pharmaceutical industry study "to the extent authorized and directed by law." Therefore, it is apparent that the Government is properly cognizant of plaintiff's need for confidentiality.

Focusing on the contractual nature of the access-to-records clauses, plaintiff lastly relies on language in *Bristol* and *Merck* that the interpretation of any contractual provision turns on the intent and understanding of the parties involved and that "it is inconceivable" that a contracting firm would have understood the clause in the manner in which the Government now interprets it. See *e.g., Merck, supra,* mem. op. at 5. Even assuming that Lilly's understanding would be controlling, we disagree with the *Bristol* and *Merck* language, at least as applied to this case, since the contracts at issue were signed after the landmark *Hewlett-Packard* decision and Lilly knew that the Government's similar position was adopted there or at least is chargeable with that knowledge. See *Stencel Aero Engine Co. v. United States,* 431 U.S. 666, 674 n. 8.

The Government's counterclaim sets forth the following demand for access to and examination of:

> "* * * any books, documents, papers, or records of plaintiff Lilly that relate to and involve transactions relating to pricing and experienced costs including costs of direct materials, labor, overhead and other corporate costs, support for prices charged to the Government and such other necessary information which would permit his [the Comptroller General's] representatives to review the reasonableness of the contract prices provided for in the aforesaid contracts."

The plaintiff describes this as a request for records such as involved in *Hewlett-Packard* (Br. 53). The Government's brief reiterates that it seeks only the relief requested in its counterclaim (Br. 41). Therefore, the district court need not grant access to any additional documents,

and no information need be produced relating to classes of costs that have no more than a *de minimis* impact on the price of a product purchased by the Government. In granting summary judgment for defendants on remand, the district court is directed to include the confidentiality subparagraphs contained in defendants' proposed order previously submitted below.

Reversed and remanded for further proceedings consistent herewith.

PELL, *Circuit Judge,* dissenting.

Viewing as I do, the majority opinion in this case as an unwarranted, and unfortunate, extension of the Big Brother concept into legitimate privacy in the industrial field, I respectfully dissent. While I might have adopted minor differences of phraseology here and there in a dispositive opinion from that used by Judge Holder in his detailed Summary Judgment, those differences are so minimal, and his analysis and legal conclusions appear to me to be so eminently correct, I would adopt that judgment as the judgment of this court. Because Judge Holder's Summary Judgment is not reported, and although substantial portions thereof have been set forth in the majority opinion of this court, so as to put the case into proper perspective, I am attaching a copy of it to this dissenting opinion.

With all due respect to the obviously careful and thorough draftsmanship reflected in the majority opinion, I am unable to come away from a reading of it without the feeling that it strains to find justification for the Comptroller's broadsweeping attempt to delve into information in excess of his authority under law. This appears particularly evident in that portion of the opinion falling back for support on 31 U.S.C. §§ 53 and 67, sections of statutes which apparently the Comptroller himself has abandoned as supporting his "claim of right," and which do not appear as citations in the briefs filed by the Comptroller in this court.

I cannot be unmindful of the contrary *holding* in *Hewlett-Packard Company v. United States,* 385 F.2d 1013 (9th Cir. 1967), *cert. denied,* 390 U.S. 988 (1968). It pervades on a *passim* basis both the two briefs of the Comptroller and

the majority opinion. That the majority opinion is relying more on the *holding* of that case than the acuteness or depth of the analysis appears rather clear from a comparison of the length of *Hewlett-Packard* with the majority opinion in the present case. It would seem that the extended and detailed analysis of the majority opinion would scarcely have been necessary if *Hewlett-Packard* had set forth a persuasively correct analysis. Two federal district judges, of course, in the pharmaceutical context here involved have declined to follow the broad approach which the majority finds in *Hewlett-Packard*. *Bristol Laboratories Division of Bristol-Myers Company v. Staats,* 428 F.Supp. 1388 (S.D. N.Y. 1977); *Merck & Co., Inc. v. Staats,* Civil Action No. 74-1447 (D.D.C. Aug. 12, 1977). Even if the majority in the present case were unwilling to accept what they have termed as Judge Holder's "narrowest reading" of the language involved, it would appear to me that the *Bristol* and *Merck* readings should, in any event, have been an appropriate stopping place. I agree with Lilly's analysis of *Hewlett-Packard* that the Ninth Circuit's interpretation of the word "contract" is tortured and that the key words are "directly pertinent." *Hewlett-Packard,* of course, did not concern an industry study or alleged improper purpose.

In sum, the judiciary should not give the Comptroller coercive power to pursue quidnuncish purposes which power has been refused by Congress and which would require private companies to open their records to him to make it easier for him to study the cost and practices of the entire pharmaceutical industry. In the present case, which must be considered and determined on its own particular facts, because neither the negotiations nor the performance of the seven contracts was in any way dependent upon or directly related to, Lilly's costs of production, profits, or pricing methodology, the records relating to such information cannot, in my opinion, be deemed "directly pertinent" to those contracts, as required by the statutes and contract clause.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ELI LILLY AND COMPANY, *Plaintiff,* v. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, *Defendant,* UNITED STATES OF AMERICA, *Intervenor.*	CAUSE NO. IP75-72-C

SUMMARY JUDGMENT

This cause is before the Court on the motion of the defendant-intervenor, the United States of America, for summary judgment on its Counterclaim, and the motion of the plaintiff, Eli Lilly and Company, for summary judgment on its Complaint and on the Counterclaim, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court, having considered the pleadings, affidavits, answers to interrogatories and depositions on file, and the briefs filed in support of and in opposition to the motions, and having heard oral argument and being duly advised in the premises, now finds the facts and states its conclusions of law as follows:

I.

Findings of Fact

1. Plaintiff, Eli Lilly and Company ("Lilly"), is a corporation organized and existing under the laws of the State of Indiana with its principal place of business in Indianapolis, Indiana. It is engaged, among other things, in the business of manufacturing drug products and marketing them in intrastate and interstate commerce, including sales to various agencies of the federal government.

2. The defendant, Elmer B. Staats, is the Comptroller General of the United States and is a citizen of a state other than the State of Indiana.

3. This action arises under the laws of the United States, particularly the Armed Services Procurement Act,

10 U.S.C. § 2313(b), and the Federal Property and Administrative Services Act, 41 U.S.C. § 254(c). An actual controversy exists within the jurisdiction of this Court between Lilly and the Comptroller General.

4. The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

5. Lilly initiated this action by filing its Complaint for a declaratory judgment pursuant to 28 U.S.C. § 2201 and for a permanent injunction, asking the Court to declare that a request by the Comptroller General to examine certain records of Lilly exceeds his legal authority and to enjoin the Comptroller General from examining or attempting to examine those records. The United States of America ("the government") intervened and filed a Counterclaim for a declaratory judgment and permanent injunction, asking the Court to declare that the Comptroller General has the right to examine the records of Lilly, to enjoin Lilly from preventing the Comptroller General from examining the records, and to direct Lilly to make the records available for examination.

6. The Veterans Administration ("VA") and the Defense Supply Agency ("DSA") of the Defense Department awarded certain negotiated fixed-price contracts for pharmaceutical products to Lilly. The contract numbers, dates of award, contract prices and dates of final payment on the contracts are as follows:

Contract No.	Date of Award	Price	Date of Final Payment
VA			
V797P-5169c	1- 8-74	$5,142,152.80 (estimated)	4-29-76
DSA			
DSA120-74-C-1401	11- 7-73	29,084.00	3-20-74
DSA120-74-C-0125	6-27-73	204,456.96	11- 9-73
DSA120-74-C-1639	11-28-73	461,429.28	4-22-74
DSA120-74-C-0896	10- 9-73	78,918.00	5-10-74
DSA120-74-C-1176	10-19-73	31,767.50	3-13-74
DSA120-74-C-1640	11-28-73	45,923.20	4-19-74

7. The contracts were awarded to Lilly as a result of Lilly's submitting a proposal to the agency involved in response to the agency's solicitation of a proposal from Lilly. With respect to six of the contracts, Lilly was the sole offeror, and the contracting agency awarded the contract to Lilly on the basis of a comparison of Lilly's offered prices to Lilly's standard catalog prices for the drugs being purchased. In each case, the contract price was lower than Lilly's standard wholesale commercial catalog prices. The government, therefore, in every purchase from Lilly acquired Lilly products at prices lower than the going commercial market price for those products.

With respect to the seventh contract (DSA120-74-C-1640), offers were submitted by two companies and the award was made to Lilly because acceptance of the other company's offer was precluded by the Buy-American Act, and also because the government contracting officer determined that the offered price was fair and reasonable based on the competition received.

The product prices in each of the seven contracts were identical to the prices initially offered by Lilly and were not actually negotiated. The prices in each contract were fixed and were not based on any type of "cost-plus" formula.

Lilly was not required to submit cost or pricing data to the contracting agencies prior to the award of any of the contracts, because the product prices in all of the contracts were based either on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public, within the exemption provisions of the Truth-In-Negotiation Act [10 U.S.C. § 2306(f)] and, in the case of the VA contract, the exemption provisions of the similar federal procurement regulation [41 C.F.R. § 1-3.807-3(a) and (b)]. In addition, each of the contracts is exempt from the Renegotiation Act (50 U.S.C. App. §§ 1211, *et seq.*) because the contracts were for "standard commercial articles." 50 U.S.C. App. § 1216(e)(1).

8. Neither the negotiations nor the performance of the seven contracts by Lilly or the government were in any way dependent upon, or directly related to, Lilly's costs

of producing the drugs purchased under the contracts, the profits realized by Lilly, or the methodology by which Lilly establishes its catalog prices for standard commercial articles.

9. Each of the contracts contains an access-to-records clause which provides in pertinent part:

> "The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract * * *, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract."

That clause was included in the DSA contracts pursuant to the provisions of 10 U.S.C. § 2313(b) which provides:

> "(b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract."

and was included in the VA contract pursuant to the provisions of 41 U.S.C. § 254(c) which provides:

> "(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. * * *"

10. Lilly has been selling pharmaceutical products to agencies of the United States at least since World War II.

The government's business constitutes a very small part of Lilly's sales of pharmaceutical products, approximately two percent. The government purchases Lilly pharmaceuticals in basically two ways: (1) on an as-needed basis at or below Lilly commercial wholesale catalog prices, and (2) by solicitation for bids on given quantities of specific products. When the government purchases through solicitations by the Veterans Administration or the Defense Department, the prices to the government are further reduced from commercial wholesale catalog prices, resulting in the government getting Lilly products at prices lower than anyone else.

11. The Comptroller General of the United States appeared before the Subcommittee on Monopoly of the Senate Select Committee on Small Business in 1971. During those hearings, which were concerned with the status of competition in the pharmaceutical industry, the costs of drugs procured by the government were discussed at length. Upon learning of the existence of the access-to-records clause in negotiated contracts, the Chairman of the Subcommittee, stated to the Comptroller General:

> "I realize it may be a very complicated matter, but it would seem to me that all companies ought to be served notice that the GAO is going to utilize this statute. I think that *we* ought to take a look at some of those costs." *Hearings on Competitive Problems in the Drug Industry, supra,* at 8020. (Emphasis added.)

12. Following those hearings, a series of conversations were held between members of the Chairman's staff and GAO officials. These conversations, as reflected in the contemporary correspondence of the participants, reveal most clearly the character of the government's interest in pharmaceutical industry cost records. Cost and profit data was to be obtained about individual drugs and about individual drug companies. That information would then be publicly released. Specifically, a subcommittee staff preference was expressed that "rather than attempt to obtain such costs records under an arrangement that would preclude reporting of manufacturing firm name or identifying individual drug items," it was preferable "to press for obtaining

such records without any strings attached so that the high profits could be publicized by product and firm". As recently as April 29, 1974, it was stated that the only way the GAO could serve the Subcommittee's objectives "will be to gather and publicize specific price and cost data for individual products—particularly those for which competition is limited and price mark-ups are high". The Chairman's staff told the GAO that it "should obtain the cost records without any strings attached so that the information could be used as needed." The Subcommittee's avowed purpose for wanting industry and company cost data has continued to date and the GAO admits to knowing of no change in the Subcommittee's intended use of the data sought.

13. The GAO thus proceeded to seek access to drug companies' records because, in light of the Subcommittee's demands, "it appears from a long-range Office viewpoint that there is no viable alternative than to press the companies for access to their cost data." The GAO believed that if it gained access to the cost records, it "would obtain cost data of some sort on individual drug items with unusually high profit history that could be used to direct public attention to an individual item and an individual drug manufacturer." Although the GAO considered alternative studies which would not result in the identification of costs of individual drugs and individual drug companies, it stated that one disadvantage of those those alternatives was that "Congressional committees concerned with unit costs would not be satisfied." As late as July, 1974, the GAO again considered one such alternative using a third-party to do the examination of the records, but there was "considerable concern as to whether such an arrangement would be acceptable," to members of the Senate Committee.

14. In order to satisfy the interest of the Subcommittee and at the same time make an economic study of the pharmaceutical industry, the GAO initially sought access to drug companies' cost records on a voluntary basis. In late 1972, the GAO aproached the Pharmaceutical Manufacturers Association ("PMA") and requested its member firms to participate in a study of the pharmaceutical

industry, its production process, efficiency, costs and profits. This initial proposal was rejected because it was not feasible and because the confidentially of the drug companies' data would not be protected. The GAO then modified its objectives by June, 1973, and proposed a revised study to be conducted in two phases.

15. In Phase I of that study the GAO intended to learn the general nature, peculiarities and problems of the pharmaceutical industry, focusing specifically on manufacturing processes, accounting systems, and marketing policies, and to select the areas to be studied in depth in Phase II. Phase I was to include visits to the facilities of the cooperating pharmaceutical companies.

16. Lilly and five other pharmaceutical companies volunteered to participate in Phase I with the understanding that access to detailed cost records pertaining to specific products would not be granted. During October, 1973, GAO officials visited and inspected Lilly's facilities and operations in Indianapolis and consulted at length with a number of Lilly officials. The GAO also made similar visits to the five other cooperating pharmaceutical companies.

17. On March 21, 1974, GAO met with representatives of the six cooperating companies to present and discuss its preliminary Phase I findings. On or about April 17, 1974, GAO issued the Phase I report in written form and a proposal for Phase II. Detailed and specific comments on the GAO report were submitted by PMA on behalf of the six cooperating companies, and separate comments were also submitted by the individual cooperating companies, including Lilly.

18. The Comptroller General, following the receipt of the critical comments upon his Phase II proposal, decided to abandon the plan of obtaining the drug companies' records on a voluntary basis. In August, 1974, the Comptroller General sent demand letters to the six drug companies who had volunteered to cooperate during Phase I asking for access to their cost and pricing records on individual products purchased under specified contracts. The demand letters were released only after the GAO conferred with the Committee Chairman and obtained his

approval. Moreover, after the letters were sent, the GAO has had continued correspondence with the Chairman in order to report the status of its attempt to gain access to the drug companies' cost records.

19. The Comptroller General's demand letter to Lilly dated August 26, 1974, claims authority under the access-to-records clause in the seven negotiated contracts described in paragraphs 6-9 hereof. The letter begins:

> "As you know, because of the increasing Federal involvement in the procurement of pharmaceuticals, the General Accounting Office has underway a review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts. This examination is being conducted at several drug companies, including Eli Lilly and Company * * *.
>
> "For some time we have been attempting to gain access to records we consider necessary to conduct such a review. In this regard, in June 1973 we met with representatives of the Pharmaceutical Manufacturers Association and six drug firms to initiate a comprehensive review using data provided on a voluntary basis by representative industry firms. However, the industry firms have not provided us access to the records necessary to satisfactorily carry out our statutory responsibilities."

The Lilly records to be examined are described as:

> "* * * all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests. * * *"

20. The government concedes that there is no reason to believe that Lilly did anything illegal, improper or

fraudulent in the negotiation or performance of the seven contracts involved in this suit. The government concedes that there is no reason to believe the government was induced by Lilly to enter into any contract here involved or to agree to any term of any such contract as a result of Lilly's failure to disclose information required to be disclosed at the time of contracting. The government also concedes that Lilly was not required to submit any cost or pricing data at the time these contracts were entered into. Specifically with respect to the DSA contracts, cost and pricing data were not required because the agency had determined that the contract price for one such contract was based upon adequate price competition and that the contract prices of the remaining such contracts were based on established catalog or market prices of commercial items sold in substantial quantities to the general public. With respect to the VA contract, cost and pricing data were not required because the purchasing agency had determined that the contract price was based on established catalog or market prices of commercial items sold in substantial quantities to the general public.

21. Further, the government concedes that its purpose is not to audit Lilly's negotiations and performance of the contracts involved in this suit. It was asked and responded to Lilly's Interrogatory 12 as follows:

> "*Plaintiff's Interrogatory No. 12*
>
> "Is the sole purpose of the requested examination of Lilly's books and records to audit Lilly's negotiations and performance of the contracts involved in this suit? If the answer is in the negative, state all the purposes for which the requested examination is sought?
>
> "*Answer to Interrogatory No. 12*
>
> "The sole purpose of the requested examination of Lilly's books and records is not to audit Lilly's negotiations and performance of the contracts involved in this suit. Rather, the purpose of the requested examination, as presently contemplated, is to review contract pricing by the Government's suppliers, including Lilly, of drug items to determine

the adequacy of the protection afforded the Government by the negotiation techniques used by the procuring agencies. Accomplishment of this objective is contingent upon GAO's ability to gain access to the records needed to (1) ascertain the nature of the activities for which the drug firms are incurring costs, (2) to ascertain and verify the extent to which the costs of these activities affect the prices paid by the Government for items procured under the specified negotiated contracts, and (3) to determine the bases of firms' pricing considerations for the products and, particularly, the applicability of these considerations to any Federal procurement of the products involved."

22. The government also admits that one purpose of its study "is to have a better public understanding and legislative understanding of the economics of the industry."

23. Lilly has refused to comply with the Comptroller General's demand letter of August 26, 1974, on the ground that the Comptroller General's demand exceeds his authority under the access-to-records clause and statutes, for two reasons: (a) the request is being made for an improper purpose; and (b) the records requested do not directly pertain to, and involve transactions relating to, the seven particular contracts involved in this suit.

24. Among the major items of cost incurred by Lilly in producing and marketing its pharmaceutical products, including those sold to the government, are general administrative costs, marketing costs, and research and development costs. These major items are not assigned or allocated to individual pharmaceutical products or sales contracts under Lilly's accounting system and no generally accepted accounting principle exists for making such an allocation of those types of indirect costs to specific products or specific contracts.

25. The records of Lilly which the Comptroller General seeks to examine contain confidential business information and secrets, and Lilly would, if such information were made public, suffer irreparable competitive injury in excess of $10,000.00.

II.

Conclusions of Law

1. The Court has jurisdiction over the subject-matter of this action and personal jurisdiction over the parties.

2. There is no genuine issue or substantial controversy as to the existence of the aforesaid material facts.

3. The Comptroller General's August 26, 1974, demand for access to Lilly's records exceeds his authority under the access-to-records clause in the contracts and under the statutes, 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), because the Comptroller General is using that authority for a purpose which neither the contract clauses nor the statutes were designed to serve, namely, for the purpose of conducting a research study on the economics of the entire pharmaceutical industry. Any administrative authority to investigate may be exercised only for a purpose for which the authority is granted. *Burlington Northern, Inc.* v. *Interstate Commerce Comm'n,* 462 F.2d 280 (D.C. Cir. 1972), *cert. denied* 409 U.S. 891, 93 S.Ct. 120, 34 L.Ed. 2d 148 (1972); *Chattanooga Pharmaceutical Ass'n* v. *United States Dep't of Justice,* 358 F.2d 864 (6th Cir. 1966); *Shasta Minerals & Chemical Co.* v. *Securities & Exchange Comm'n,* 328 F.2d 285 (10th Cir. 1964); *Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F.2d 147 (D.C. Cir. 1961). Here, the purpose of the Comptroller General's access-to-records authority under negotiated contracts is to permit audits of the negotiations and performance of particular contracts awarded by negotiation. Congress has not given the Comptroller General coercive power to require private companies to participate in research projects undertaken by the GAO pursuant to 31 U.S.C. § 53 or otherwise, and his limited authority under the access-to-records clause in negotiated contracts cannot be used for such a broad purpose. *United States* v. *Humble Oil & Refining Co.,* 488 F.2d 953 (5th Cir. 1974), *vacated,* 421 U.S. 943, 95 S.Ct. 1670, 44 L.Ed.2d 97 (1975), *on remand,* 518 F.2d 747 (5th Cir. 1975).

Moreover, construing the Comptroller General's limited access authority under negotiated contracts to permit access for an investigation of an entire industry would raise

serious constitutional questions because of the Fourth Amendment's requirement that an administrative agency's demand for corporate records be relevant in purpose. *See* v. *City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). Therefore, the Comptroller General's authority must be narrowly construed to limit the right of access to the purpose for which the right was granted, namely, to audit particular negotiated contracts. *United States* v. *Humble Oil & Refining Co., supra; Civil Aeronautics Board* v. *United Airlines, Inc.,* 399 F.Supp. 1324 (N.D. Ill. 1975).

4. The Comptroller General's August 26, 1974, demand for access to Lilly's records also exceeds his authority under the access-to-records clause and statutes because the categories of records described in that request do not directly pertain to, and involve transactions relating to, the particular contracts involved in this suit. Since each of the contracts was a fixed-price contract awarded to Lilly solely on the basis of competitive bids received or a comparison of Lilly's offered price with its standard catalog price, and since each contract was exempt from the Truth-In-Negotiation Act and Renegotiation Act, neither the negotiations nor performance terms of the contracts were in any way dependent upon, or directly related to, Lilly's costs of production, profits or methodology by which Lilly establishes its prices, including its standard catalog prices. Therefore, records relating to those types of information do not directly pertain to, and involve transactions relating to, the particular types of negotiated contracts involved in this suit.

In addition, even if cost and pricing records were deemed relevant to these types of negotiated contracts, the Comptroller General's demand in this case still exceeds his authority because the demand is too broad. The request for records relating to Lilly's pricing would encompass records relating to the methods by which Lilly establishes its standard catalog prices. Those catalog prices, however, were necessarily set without regard to the particular contracts involved in this suit. Likewise, the Comptroller General's request for cost records encompasses records relating to non-allocated and non-allocable costs, including general administrative costs, marketing costs, and research and development costs, which Lilly does not assign or allocate to particular products or contracts, and which are incurred without relation to a particular product or contract. Therefore, the Comptroller General's demand encompasses pricing and cost records which are not directly pertinent to, and do not involve transactions relating to, the particular products purchased under the particular contracts involved in this suit.

5. Lilly is entitled to a judgment as a matter of law on its Complaint and on the government's Counterclaim.

6. Lilly is entitled to a permanent injunction enjoining the Comptroller General, his agents, servants, employees and attorneys, and all persons in active concert or participation with them, from examining or attempting to examine the records of Lilly described in the Comptroller General's demand letter of August 26, 1974.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED THAT:

(1) The motion for summary judgment of the defendant-intervenor, the United States of America, be, and the same hereby is, denied.

(2) The motion for summary judgment of the plaintiff, Eli Lilly and Company, be, and the same hereby is, granted in all respects.

(3) The Comptroller General's August 26, 1974, demand to examine Lilly's records exceeds his legal authority under 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) and the access-to-records clauses in the seven contracts involved in this suit. Under that authority, the Comptroller General has the right to examine Lilly's contract files on the specified contracts and other records which would enable the Comptroller General to determine:

(a) Lilly's standard catalog prices for the products purchased under the specified contracts;

(b) That the prices of the products purchased were based upon established catalog or market prices of commercial items sold in substantial quantities to the general public; and

(c) That the prices received by the government under the contracts were equal to or less than the catalog prices.

The Comptroller General has no right to examine records of Lilly under 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) or under the access-to-records clauses now before the Court, including particularly Lilly cost records and pricing records, except those records referred to above.

(4) The Comptroller General, his agents, servants, employees and attorneys, and all persons in active concert or participation with them, are permanently enjoined from examining or attempting to examine Lilly records, except those specified above, under 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) and under the access-to-records clauses now before the Court.

(5) The Counterclaim of the defendant-intervenor, the United States of America, be, and the same hereby is, dismissed.

(6) Costs be assessed against the defendant and defendant-intervenor.

Dated: November 30, 1976

CALE J. HOLDER
United States District Judge

APPENDIX C

10 U.S.C. § 2313(b) (Armed Services Procurement Act)

"(b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract."

41 U.S.C. § 254(c) (Federal Property and Administrative Services Act)

"(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause—

"(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

"(2) where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

If the clause is omitted based on a determination under clause (2) a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable."

31 U.S.C. § 53 (Budget and Accounting Act of 1921)

"(a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

"(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

"(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

"(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

"(e) He shall furnish such information relating to expenditures and accounting to the Office of Management and Budget as it may request from time to time."

31 U.S.C. § 60 (Legislative Reorganization Act of 1946)

"The Comptroller General is authorized and directed to make an expenditure analysis of each agency in the executive branch of the Government (including Government corporations), which, in the opinion of the Comptroller General, will enable Congress to determine whether public funds have been economically and efficiently administered and expended. Reports of such analyses shall be submitted by the Comptroller General, from time to time, to the Committees on Government Operations, to the Appropriations Committees, and to the legislative committees having jurisdiction over legislation relating to the operations of the respective agencies, of the two Houses."

31 U.S.C. § 65 (Accounting and Auditing Act of 1950)

"It is the policy of the Congress in enacting this chapter that—

"(a) The accounting of the Government provide full disclosure of the results of financial operations, adequate financial information needed in the management of operations and the formulation and execution of the Budget, and effective control over income, expenditures, funds, property, and other assets.

"(b) Full consideration be given to the needs and responsibilities of both the legislative and executive branches in the establishment of accounting and reporting systems and requirements.

"(c) The maintenance of accounting systems and producing of financial reports with respect to the operations of executive agencies, including central facilities for bringing together and disclosing information on the results of the financial operations of the Government as a whole, be the responsibility of the executive branch.

"(d) The auditing for the Government, conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which accounting and related financial reporting fulfill the purposes specified, financial transactions have been consummated in accordance with laws, regulations or other legal requirements, and adequate internal financial control

over operations is exercised, and afford an effective basis for the settlement of accounts of accountable officers.

"(e) Emphasis be placed on effecting orderly improvements resulting in simplified and more effective accounting, financial reporting, budgeting, and auditing requirements and procedures and on the elimination of those which involve duplication or which do not serve a purpose commensurate with the costs involved.

"(f) The Comptroller General of the United States, the Secretary of the Treasury, and the Director of the Office of Management and Budget conduct a continuous program for the improvement of accounting and financial reporting in the Government."

Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

No. 78-190

In the Supreme Court of the United States

OCTOBER TERM, 1978

ELI LILLY AND COMPANY, PETITIONER

v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	8
Conclusion	18
Appendix	1a

CITATIONS

Cases:

Bowers Dredging Co. v. *United States*, 211 U.S. 176	14
Bristol Laboratories v. *Staats*, 428 F.Supp. 1388, appeal docketed, No. 77-6153 (2d Cir. 1977)	15
Fountain v. *Filson*, 336 U.S. 681	17
Hewlett-Packard Co. v. *United States*, 385 F.2d 1013, cert. denied, 390 U.S. 988	13, 14
Lynn v. *Biderman*, 536 F.2d 820, cert. denied, 429 U.S. 920	11
Natural Resources Defense Council, Inc. v. *Train*, 510 F.2d 692	14
Udall v. *Tallman*, 380 U.S. 1	14
United States v. *Abbott Laboratories*, No. 75 C 2345 (N.D.Ill. Apr. 24, 1978), motion to alter or demand judgment denied, July 24, 1978	16
United States v. *LaSalle National Bank*, No. 77-365 (June 19, 1978)	11, 16

Statutes:	Page
Buy-American Act, 41 U.S.C. 10a-10c	5
65 Stat. 700	9
10 U.S.C. 2304(a)	2
10 U.S.C. 2313(b)	2
41 U.S.C. 252(c)	2
41 U.S.C. 254(c)	2
Miscellaneous:	
96 Cong. Rec. 17123 (1951)	10
97 Cong. Rec. 13198 (1951)	10
3 A. Corbin, *Contracts* (1960)	14
6 *Moore's Federal Practice* (2d ed. 1976)	17
S. Rep. No. 603, 82d Cong., 1st Sess. (1951)	9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-52) is reported at 574 F.2d 904. The opinion of the district court (Pet. App. 53-66) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1978. A petition for rehearing was denied on June 30, 1978. The petition for a writ of

certiorari was filed on August 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a statutorily required contractual provision granting the Comptroller General access to "directly pertinent" records "involving transactions related to this contract" permits the Comptroller General to examine records relevant to the pricing of and cost of producing items furnished under the contract.

STATEMENT

In 1973 petitioner entered into six negotiated fixed-price contracts[1] for pharmaceutical products with the Defense Supply Agency of the Defense Department. The total contract price was approximately $850,000. In January 1974 petitioner entered into a similar contract with the Veterans Administration. The contract price was in excess of $5.1 million (Pet. App. 54). As required by statute,[2] all seven contracts contained the following "access-to-records" provision (Pet. App. 56):

[1] A negotiated government contract is a statutorily authorized method of procurement that may be used in situations where the formal public advertising and competitive bidding procedure is deemed impracticable or unnecessary. See 10 U.S.C. 2304(a); 41 U.S.C. 252(c).

[2] The relevant statutory provisions (Pet. App. 67) are 10 U.S.C. 2313(b), governing the Defense Department contracts, and 41 U.S.C. 254(c), governing the VA contract.

> [Petitioner] agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract * * *, have access to and the right to examine any directly pertinent books, documents, papers, and records of [petitioner] involving transactions related to this contract.

In late 1972 the General Accounting Office began a study of "the pharmaceutical industry, its production process, efficiency, costs and profits" (Pet. App. 58-59). Petitioner and five other pharmaceutical companies permitted GAO officials to visit and inspect company facilities and operations, but all six companies refused access to detailed cost records pertaining to specific products. In August 1974 the Comptroller General sent letters to the six companies. Invoking his rights under contractual provisions like that reproduced above, he asked for "access to * * * cost and pricing records on individual products purchased under specified contracts" (Pet. App. 59). The Comptroller General's letter to petitioner was based on the "access-to-records" provisions in the seven contracts described above. The Comptroller sought to examine (Pet. App. 60):

> all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may

be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests.

Petitioner responded to the Comptroller General's request by filing this lawsuit in the United States District Court for the Southern District of Indiana. Petitioner sought to enjoin the Comptroller General from examining (Pet. App. 28):

> (a) Lilly records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs,
>
> (b) Lilly records supporting prices charged to the Government, and
>
> (c) other Lilly records containing information for use by the Comptroller to review the reasonableness of the Lilly contract prices.

The United States intervened as a defendant and filed an answer and counterclaim seeking a declaration that the disputed contractual provisions authorized access as requested by the Comptroller General (Pet. App. 29).

The district court found (Pet. App. 61-63) that the Comptroller General had two purposes for seeking access to petitioner's records: first, "to review contract pricing by the Government's suppliers * * * of drug items to determine the adequacy of the protection afforded the Government by the negotiation techniques used by the procuring agencies," and second, to conduct a general research study on the economics of the pharmaceutical industry. The court ruled that neither purpose is legitimate and that the statutorily

required "access-to-records" provision in negotiated contracts is intended only "to permit audits of the negotiations and performance of particular contracts awarded by negotiation" (Pet. App. 63).

The court held further that the records requested by the Comptroller General "do not directly pertain to, and involve transactions relating to, the particular types of negotiated contracts involved in this suit" (Pet. App. 64). Because the seven contracts at issue were all fixed-price contracts, under which the prices paid by the government were determined not on a "cost-plus" basis but by reference to petitioner's standard catalog prices (Pet. App. 55, 64-65),[3] the district court ruled that the Comptroller General is not entitled to examine records relating to petitioner's "costs of production, profits or methodology by which [petitioner] establishes its prices, including its standard catalog prices" (Pet. App. 64). In addition, the court decided, even if cost and pricing records were relevant to the kind of negotiated contracts involved here, the Comptroller's request would still be too broad because it "encompasses records relating to non-allocated and non-allocable costs, including general administrative costs, marketing costs, and research and development costs, which [petitioner] does

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[3] Six of the contracts were awarded to petitioner because petitioner offered prices lower than its standard wholesale commercial catalog prices (Pet. App. 55). The seventh contract was awarded to petitioner because the Buy-American Act, 41 U.S.C. 10a-10c, precluded acceptance of the other offer received and because petitioner's offer was "fair and reasonable" in comparison with the other offer (*ibid.*).

not assign or allocate to particular products or contracts, and which are incurred without relation to a particular product or contract" (Pet. App. 64-65).

Accordingly, on cross motions for summary judgment, the district court sustained the Comptroller General's right to examine those records that would enable him to determine (Pet. App. 65):

> (a) [Petitioner's] standard catalog prices for the products purchased under the specified contracts;
>
> (b) That the prices of the products purchased were based upon established catalog or market prices of commercial items sold in substantial quantities to the general public; and
>
> (c) That the prices received by the government under the contracts were equal to or less than the catalog prices.

The court refused, however, to permit the Comptroller General to inspect any of petitioner's records other than those falling within this description (Pet. App. 66). In particular, the court denied access to petitioner's cost records and pricing records.

A divided panel of the court of appeals reversed (Pet. App. 27-52).[4] The court found (Pet. App. 35, 44-45) that Congress chose to require "access-to-records" provisions in negotiated contracts in order to facilitate inquiry into the government's treatment under such contracts and thus to help ensure that

[4] The dissenting judge adopted the reasoning of the district court and incorporated the district court's findings of fact and conclusions of law as an appendix to his opinion (Pet. App. 51).

the government's use of this procurement method does not result in excessively high prices. The court held that the Comptroller General's reasons for requesting petitioner's records conformed with this legislative purpose and that the records sought by the government pertain directly to the seven negotiated contracts at issue. The court explicitly adopted the Comptroller General's argument that " 'it is hard to imagine anything more directly related to a contract than the cost of producing the items covered by it or the matters going into the makeup of the price' " (Pet. App. 42). This is equally true, the court said, whether or not all of petitioner's costs are assigned to particular contracts or products (*ibid.*).[5] The court stressed that the government had recognized petitioner's need for confidentiality in connection with some of its business information and had therefore included in its proposed order a paragraph designed to minimize the possibility that data obtained from petitioner's records would be released in a form permitting attribution to petitioner (Pet. App. 49-50; App., *infra*, 3a-5a). In remanding with instructions to enter summary judgment for respondents, the court of appeals directed the district court to include in its

[5] The court acknowledged that "it might be possible to argue in other industries that costs such as research and development have such a small impact that they are not 'directly pertinent' to the contract and its price" (Pet. App. 42). The court concluded, however, that "research and other costs not immediately attributable to one product form such a large portion of the costs of a pharmaceutical product that their import to such a contract seems inescapable" (*ibid.*).

order the confidentiality provisions proposed earlier by the government (Pet. App. 51).

ARGUMENT

The court of appeals' decision correctly interprets the contractual "access-to-records" provisions and their statutory origins, is consistent with the only other court of appeals' decision on point, and does not warrant review by this Court.

1. Petitioner contends (Pet. 13-17) that the Comptroller General demanded access to its records in order to collect data for a research study of the pharmaceutical industry. Petitioner further contends that this is an improper purpose for an exercise of the Comptroller's rights under the contractual provisions here at issue. It is not at all clear that petitioner is entitled to raise such a challenge to the Comptroller General's inspection demand. The Comptroller General seeks to examine records that petitioner has voluntarily and unconditionally agreed to make available to him. It is doubtful, therefore, that petitioner is free to question the Comptroller General's motives in asserting his rights under the negotiated contracts.

In any event, however, the district court and the court of appeals found that the government requested petitioner's cost records and other materials because it wished to review negotiated contract prices for various drugs in order to determine whether procurement of pharmaceuticals by the negotiated contract method is in the government's best interest (Pet. App.

31, 35, 61-62). The legislative history of the relevant statutes demonstrates that Congress required inclusion of "access-to-records" provisions in negotiated contracts precisely in order to aid the Comptroller General in conducting such investigations.

In 1951 Congress amended the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949 to require insertion of "access-to-records" provisions in all government contracts negotiated under those statutes.[6] 65 Stat. 700. The amendment was intended, *inter alia*, to act "as a deterrent to those persons who otherwise might abuse the authority to negotiate certain contracts without advertising." S. Rep. No. 603, 82d Cong., 1st Sess. 4 (1951). In discussing the amendment's predecessor, a temporary measure enacted in the last days of the previous Congress, Representative Celler stated that the "access-to-records" provision in negotiated contracts would help prevent fraud and overreaching and would also be useful "on

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[6] The new law required contractual provisions that would provide access not only to the contractor's books, documents, papers, or records, but also to similar materials in the possession of subcontractors (Pet. App. 67). (Petitioner agreed that, if it entered into any subcontracts in connection with the performance of its duties under the seven contracts here at issue, it would include in those subcontracts a provision guaranteeing the Comptroller General's access to the subcontractor's pertinent records (Pet. App. 29).) Congress would have had no reason to require such provisions for subcontractors if it did not contemplate an investigation of the costs incurred by contractors supplying the government under negotiated contracts, including negotiated fixed-price contracts.

the question of renegotiation." 96 Cong. Rec. 17123 (1951). Representative Hardy, the sponsor of the 1951 amendment, stated that the bill was intended "to provide a deterrent to improprieties and wastefulness in the negotiation of contracts." [7] 97 Cong. Rec. 13198 (1951).

This legislative history makes plain that Congress envisioned and sought to encourage detailed government inquiry into the economic efficiency of the negotiated contract procurement method. Such inquiry requires access to suppliers' cost records. Only through examination of such records will the Comptroller General be able to determine whether the government should continue to procure particular items under negotiated contracts or whether some other procurement method (*e.g.*, formal advertising and competitive bidding) might permit the government to obtain the same items at reduced expense.

Because it is plainly legitimate for the Comptroller General to investigate the cost basis of petitioner's

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[7] Representative Hardy offered an example of the kind of practice the 1951 amendment was designed to eliminate.

> We found one situation where the Government was buying parts from an automobile dealer who, in turn, was getting them from a parts distributor who, in turn, was getting them from a small tool shop. Naturally, the price paid by the Government included profits upon profits and completely wasteful administrative and handling costs. It would be difficult, if not impossible, for GAO to detect such a situation without the right afforded in this bill.

97 Cong. Rec. 13198 (1951).

prices under the negotiated contracts, it is immaterial that he may be preparing simultaneously a study of the pharmaceutical industry in response to the request of a congressional subcommittee. Although the court of appeals determined that such a study alone would justify the Comptroller General's exercise of his rights under the contractual "access-to-records" provisions (Pet. App. 35-39), it is unnecessary to resolve that issue in this case. Petitioner agreed to grant access to its records and the Comptroller General is seeking access to those records for the very purpose that impelled Congress to legislate on the subject in 1951. Further inquiry into the Comptroller's motives is inappropriate.[8] See *United States* v. *LaSalle National Bank*, No. 77-365 (June 19, 1978).

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[8] Petitioner argues as if it were beyond question that the Comptroller had at least one "improper" motive in seeking access to the records (Pet. 13-16), and that the case thus conflicts with *Lynn* v. *Biderman*, 536 F.2d 820 (9th Cir.), cert. denied, 429 U.S. 920 (1976), which petitioner says forbids access to records when the government has both a proper and an improper purpose. Even if petitioner were correct in arguing that the contractual access provisions and the governing statutes do not authorize a research study, it would not follow that access to the records should be barred. Petitioner confuses an "improper" motive with a motive that is perfectly legitimate but not a sufficient ground, standing alone, for access. There has been no suggestion that a research study is forbidden by law or "improper" in any similar way. The most that petitioner can say is that the Comptroller General could not compel private parties to cooperate in such a project. But no principle of law forbids the Comptroller from using, for research study purposes, information lawfully obtained pursuant to some other power. Consequently, petitioner's arguments about the consequences of "improper" pursuits are beside the point.

2. Petitioner argues (Pet. 17-21) that the cost and pricing records sought by the Comptroller General are not "directly pertinent * * * records * * * involving transactions related to" the negotiated contracts. Following the district court's reasoning, petitioner asserts that its costs are not pertinent to the government contracts because the prices in those contracts were set by reference to petitioner's catalog prices, and the catalog prices "were necessarily established long before these particular procurement contracts were even contemplated" (Pet. 18-19). Petitioner also contends that, at the very least, non-allocated costs, such as research and development, marketing, and general administrative costs, are not directly pertinent to the contract prices. Neither aspect of petitioner's argument is persuasive.

The court of appeals correctly concluded (Pet. App. 42) that petitioner's pricing practices, and the cost components of the prices paid by the government, are central to the negotiated contracts here at issue. Although it is undisputed that petitioner based its prices on previously set catalog prices and that petitioner's costs were not a subject of negotiation with the government before the contracts were signed, petitioner's costs are nonetheless critical to an assessment of the advisability of continued government procurement of pharmaceuticals through negotiated contracts. If petitioner's total costs are substantially lower than the prices paid by the government, the Comptroller General may recommend that the De-

fense Department and Veterans Administration adopt different procurement methods in the future.

This reasoning was explicitly adopted by the only other court of appeals that has considered the question presented here. See *Hewlett-Packard Co.* v. *United States*, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968). The court offered the following explanation for its decision to sustain the government's right to inspect the appellant's cost records (385 F.2d at 1016):

> The subject matter of these four [negotiated fixed-price] contracts is the procurement of described property by the Government.
>
> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs. Production costs involve transactions relating to the contract, because they encompass business arrangements made by the contractor in obtaining the materials, labor, facilities and the like required by it in fulfilling its commitment with reference to the subject matter of the contract.

All seven contracts involved in this case were executed several years after the *Hewlett-Packard* decision. That decision fully conformed with the government's consistent interpretation of the now-disputed contract language. Petitioner does not suggest

that at the time it entered into the seven negotiated contracts it was unaware of either the government's construction of the "access-to-records" provisions or the court of appeals' reading of an identical provision in *Hewlett-Packard*. Under these circumstances, petitioner should not now be heard to complain that the contracts it was unaware of either the government's Comptroller General's demand to inspect cost and pricing records exceeds his rights under the negotiated contracts. See *Bowers Dredging Co.* v. *United States*, 211 U.S. 176, 188 (1908); 3 A. Corbin, *Contracts* § 537, at 45; § 556, at 243 (1960). Moreover, the Comptroller's interpretation of the contract language is based on his construction of the statutes that require inclusion of such language in negotiated contracts. This Court and other federal courts have directed that deference be paid to the interpretation given a statute by the officers or agency charged with its administration. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 706 (D.C. Cir. 1975).

Petitioner is incorrect in asserting that "the *Hewlett-Packard* court refused to grant * * * access to general records relating to indirect costs such as research and development, marketing and general administrative costs" (Pet. 20). The issue was simply not litigated in the earlier case. Here, the court of appeals correctly held (Pet. App. 42-43) that the Comptroller General's access to particular cost records should not depend on whether petitioner allocates the costs reflected in those records to individual

products or individual contracts. Petitioner's non-allocated costs apparently are a large percentage of its total costs (see note 5, *supra*) and, accordingly, the Comptroller's ability to evaluate the effectiveness of the negotiated contract procurement method would be seriously impaired if he were denied the opportunity to examine non-allocated costs. As the court of appeals accurately observed (Pet. App. 43):

> The mere fact that, as plaintiff asserts, it does not or even could not allocate costs such as research and development to an individual contract does not undercut the proposition that those costs are directly pertinent to an individual contract but merely indicates that they are directly pertinent to more than one individual contract.[9]

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[9] Petitioner has cited four other cases, now pending in the district courts, that arose from the Comptroller General's efforts to inspect drug company records under contractual "access-to-records" provisions (see Pet. 7 n.4). In *Bristol Laboratories* v. *Staats*, 428 F.Supp. 1388 (S.D.N.Y.), appeal docketed, No. 77-6153 (2d Cir. 1977), the court of appeals has remanded the case to the district court for consideration of Bristol's request for a protective order. Although the access granted the Comptroller General in *Bristol* is arguably more limited than that authorized by the court of appeals here, the district court in *Bristol* did agree that resolution of the access issue "should not depend entirely on a contractor's bookkeeping method, i.e., whether it does or does not assign particular costs to particular contracts or products" (428 F.Supp. at 1391). Rather, the court ruled that Bristol should make available to the Comptroller General "all records relating to manufacturing costs and the pricing of the products sold to the government" (*ibid.*). Whether as a practical matter there will be any difference between the scope of the order entered by the district court in *Bristol* and the order contemplated by the court of appeals in this case remains to be seen. Because the *Bristol* order has not yet been reviewed by the court of

3. Finally, petitioner contends (Pet. 21-23) that the court of appeals should not have directed the district court to enter summary judgment for the government. This argument is incorrect. The court of appeals' construction of the contractual "access-to-records" provisions is a matter of law, and no issue of material fact remains in the case.

Petitioner maintains that "[t]he most important remaining issue concerns other purposes of the Comptroller General's demand for access" (Pet. 21). But, as demonstrated above (see pages 8-11, *supra*), the Comptroller's purpose in seeking petitioner's cost records is proper, and any additional purposes he may have had are immaterial to the legitimacy of his request. *United States* v. *LaSalle National Bank*, *supra*, slip op. 17-19. The other "remaining factual issue" identified by petitioner is "whether the Comptroller General will exceed the scope of his authority once access to [petitioner's] records is granted" (Pet. 22). This question has no bearing on the propriety of summary judgment for the government. The Comptroller's access to petitioner's records will be limited by the district court's order and by the contractual "access-to-records" provisions. The court of appeals

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appeals, any discrepancy is purely speculative and therefore does not provide sufficient reason for this Court now to grant the review that petitioner seeks. (In *United States* v. *Abbott Laboratories*, No. 75 C 2345 (N.D. Ill. Apr. 24, 1978), another of the district court cases cited by petitioner, the court granted summary judgment for the government in reliance on the court of appeals' decision in this case. On July 24, 1978, the district court denied Abbott's motion to alter or amend the judgment.)

explicitly directed the district court to include in its order the government's proposed paragraph designed to safeguard the confidentiality of petitioner's records. If, after entry of summary judgment for the government, the Comptroller General tries to exceed his authority under the court's order, petitioner will be free to return to the district court and seek further relief.

Fountain v. *Filson*, 336 U.S. 681 (1949), on which petitioner relies, does not support its position. In that case, this Court reversed the court of appeals' grant of summary judgment because the appellate court's decision was based "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court" (*id.* at 683). The court of appeals there erred in depriving petitioner of any chance "to dispute the facts material" to the new issue (*ibid.*). By contrast, in this case the court of appeals ruled on precisely the legal issue that had been considered by the district court—the proper construction of the "access-to-records" provisions in the negotiated contracts. When the court of appeals reached a different legal conclusion, there was no occasion for a remand for further factual development. As Professor Moore has written, "*Fountain* v. *Filson* * * * does not deny the existence of appellate power to dispose of a case in accordance with the law and the facts; and under certain circumstances this will include a reversal with directions to enter judgment for the appellant." 6 *Moore's Federal Practice* ¶ 56.27[2], at 56-1562 (2d ed. 1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

APPENDIX

IMPLEMENTING PARAGRAPHS OF PROPOSED ORDER GRANTING ACCESS TO CONTRACTOR'S RECORDS

IT IS ORDERED,

That the Comptroller General of the United States and his duly authorized representatives have the right to examine all books, documents, papers, or records directly relating to the pricing and cost of producing items furnished by plaintiff Lilly under the following contracts numbered: V797P-5169(C), DSA120-74-C-1401, DSA120-74-C-0125, DSA120-74-C-1639, DSA 120-74-C-0896, DSA120-74-C-1176 and DSA120-74-C-1640, including, but not limited to, records of experienced costs, including costs of direct materials, labor, overhead, and other corporate costs, records in support of prices charged by the plaintiff and all other data and records of Lilly concerning activities and operations of said company which were involved in any way with the incurrence of costs in furnishing the items produced pursuant to said contracts, and it is

FURTHER ORDERED,

That the plaintiff, Lilly, its officers, agents, servants, attorneys, employees and all persons in active concert or participation with them who receive actual notice of an order by personal service or otherwise, are enjoined from preventing the duly authorized representatives of the Comptroller General of the United

States from obtaining access to and examining any books, documents, papers, or records of the plaintiff that relate to and involve transactions relating to the pricing and cost of producing the items which were furnished by plaintiff Lilly, pursuant to the above-mentioned contracts; and plaintiff Lilly, including its officers and subordinates, are directed to have available on the premises of Lilly, Indianapolis, Indiana, and its other principal offices wherever located, such books and records at a time and date to be fixed by the Court upon application of the Comptroller General of the United States or his duly authorized representatives, and it is

FURTHER ORDERED,

That the plaintiff, Lilly, its officers, agents, servants, attorneys, employees and all persons in active concert or participation with them who receive actual notice of an order by personal service or otherwise are enjoined from preventing the duly authorized representatives of the Comptroller General of the United States from obtaining access to and examining any books, documents, papers, or records of plaintiff Lilly that relate to and involve transactions relating to pricing and experienced costs including costs of direct materials, labor, overhead, and other corporate costs, support for prices charged the Government, and other information which would permit representatives of the Comptroller General of the United States to review the contract prices provided for in the aforesaid contracts, and it is

FURTHER ORDERED,

That every book, report, papers, record, and other document (all hereinafter referred to as "document"), designated as confidential by Lilly or any of its divisions or subsidiaries and provided or otherwise made available to the Comptroller General or any of his successors, agents, employees, or subordinates (all hereinafter referred to as "the Comptroller General"), and every summary thereof and extract therefrom, and all data and information contained therein, including accountants' workpapers (all hereinafter referred to as "data"), shall be held in confidence and shall not be provided or otherwise made available by the Comptroller General to any person or agency outside the General Accounting Office except as provided in subparagraphs (a), (b), and (c), below. No copies of Lilly's documents shall be included in accountants' workpapers without the approval of Lilly.

Any document and data referred to in the above paragraph shall be used by the Comptroller General solely for the purpose of a contract study. Upon completion of that study, the Comptroller General shall immediately return to Lilly all documents described in that paragraph. Any data in which Lilly, any of its divisions or subsidiaries, or any product manufactured or sold by any of them are or may be directly or indirectly identified which the Comptroller General deems it necessary to retain shall be retained by the General Accounting Office and deposited with and maintained by the Comptroller General under secur-

ity measures to be agreed upon by the parties. Access to such data by any person shall be permitted only upon written authorization of the Comptroller General, and as limited in the subparagraphs following next denominated a, b, and c.

(a) Any of the data referred to in the above paragraphs may be published, provided to, or otherwise made available to a person or agency outside the General Accounting Office if the data are published, provided, or made available in such a way that any direct or indirect identification of Lilly, any of its divisions or subsidiaries, or any product manufactured or sold by any of them, is not reasonably possible. Lilly shall be afforded a reasonable opportunity to examine and offer its comments regarding any data considered for release, including any report issued by the Comptroller General that includes such data, before release of the data or report.

(b) The Comptroller General may comply without regard to the limitations of this Order set forth above, with an official written request for any of the data referred to above submitted to him by either House of Congress, or any committee of the House of Representatives or the Senate, or any joint committee of the two Houses, having jurisdiction over the subject matter of the study referred to in the Affidavit of Gregory J. Ahart filed in this action, to the extent authorized and directed by law. The Comptroller General will cause prompt notice of any such request to be given to Lilly and to this Court at least seven

calendar days prior to furnishing the data requested, and it is

FURTHER ORDERED,

That the Comptroller General and the United States shall notify Lilly promptly of any request for disclosure, subpoena *duces tecum*, civil action, or other order or application for an order seeking production, release, or disclosure of any data referred to above, and further agree to use their best efforts to protect the confidentiality of of such data, except as provided above, including resort to appropriate judicial remedies and cooperation with Lilly in such efforts, * * *.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 275784 146

Supreme Court, U. S.
FILED
OCT 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1978

No. 78-190

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v.
ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The Brief for the Respondents in Opposition ("government's brief") argues that the Comptroller General's demand for access to all of Lilly's records is supported by not just one but several purposes, at least one of which is germane to the access statutes and clauses. The government's brief argues that if one purpose is germane then it doesn't matter what other purposes the Comptroller General may have.

that an administrative agency can abuse its authority for purposes extraneous to its authorizing statute so long as its action is camouflaged by a proper purpose. In *LaSalle,* the Court simply held that the Internal Revenue Service can issue a summons for the dual purpose of investigating both civil and criminal tax liability, because the "criminal and civil elements are inherently intertwined." 98 S.Ct. at 2363. Here, on the other hand, the Comptroller General is using his access-to-records authority for the purpose of a research study on the entire pharmaceutical industry, which is totally unrelated to the purpose of the access statutes and clauses. Furthermore, in *LaSalle,* the Court carefully noted that the IRS can issue summonses only for the specific purposes contemplated by the statute creating the summons power. 98 S.Ct. at 2367, n. 18. Unlike the Seventh Circuit's holding here that the Comptroller General can use his limited access-to-records authority under government contracts to facilitate *any* of his powers, the Court in *LaSalle* held that the IRS could not issue summonses for purposes extraneous to the statute granting the power. Therefore, the Court did not foreclose inquiry into the institutional motives of the IRS in issuing a summons, for if issued solely for a criminal investigatory purpose, the summons would have been unlawful.

Accordingly, the government's brief mistakenly claims that it is unnecessary to resolve the issue of whether the Comptroller General can use his limited access-to-records authority under the procurement statutes as a tool to serve extraneous purposes. That issue cannot be avoided except by ignoring it. This Court should decide whether the Comptroller General's extraneous purposes can escape judicial review if superficially combined with an alleged proper purpose.

QUESTION 2

The government's brief does not deny that the Seventh Circuit's holding will permit access to virtually *all* of the cost records of *every* private company which enters into a negotiated procurement contract with the federal government, regardless of the nature of the contract involved. Instead, the government's brief argues that an examination of cost records, including indirect cost records, is necessary in order to evaluate the procurement technique used in awarding the contract. (Respondents' Brief, pp. 12-15.) The government, however, commits the same error committed by the Ninth Circuit in *Hewlitt-Packard* v. *United States,* 385 F.2d 1013 (9th Cir. 1967), *cert. denied,* 390 U.S. 988 (1968)—it rewrites the access-to-records statutes. In *Hewlitt-Packard,* the Ninth Circuit held that cost records directly pertain to contracts of the type involved here only because the Court equated the meaning of the statutory term "contract" with the "general subject matter of procurement." 385 F.2d at 1016. Similarly, the government here is in effect stating that the statutes allow access to records which directly pertain to "an evaluation of the negotiated procurement method," rather than just allowing access to records which directly pertain to the "contract." A broad range of materials may be pertinent to an evaluation of the negotiated procurement method but not directly pertinent to the contract itself.

Nevertheless, by the mere device of twisting the definition of a term which otherwise has a commonly understood meaning, the statutory limits on the Comptroller General's access-to-records authority have been removed. That is precisely a second reason why this case requires review by this Court. Congress intended to grant only limited access to private contractors' records by limiting access to

records which "directly pertain" to a contract. However, that intent is being defeated by judicial editing of the statutes, the latest and most extensive version of which is the Seventh Circuit's opinion in this case.

QUESTION 3

The government's brief argues that the Seventh Circuit properly directed the entry of summary judgment for the government because the construction of the access-to-records provisions is a matter of law. (Respondents' Brief, p. 16.) That argument is another example of the government's attempt to convert this case into a simple contract case. Even if the meaning of the access-to-records clauses were a question of law, whether the Comptroller General is abusing his authority in invoking the clauses for extraneous purposes is a question of fact. Lilly has asserted and the government has denied that the Comptroller General is demanding access to Lilly's records for the extraneous purpose of providing cost and profit data to a Senate subcommittee, which in turn intends to expose the data to the public for the sake of exposure. Therefore, the presence of that genuine issue of fact is sufficient in itself to render summary judgment for the government improper.

As for the other remaining factual issue of whether the Comptroller General will exceed the scope of his authority once access to Lilly's records is granted, the government states that such question has no bearing on the propriety of summary judgment because the "Comptroller's access to [Lilly's] records will be limited by the district court's order and by the contractual 'access-to-records' provisions." (Respondents' Brief, p. 16.) If that is true, then why does the Comptroller General state on the record that he cannot identify any records of Lilly which he does *not*

want to examine? The reason is that the Comptroller wants to examine *all* of Lilly's records in order to determine *which* records he has a right to examine. At the very least, that, too, is a factual issue which precludes summary judgment for the government.

CONCLUSION

The government's brief does not deny that the Seventh Circuit's holding in this case will have a devastating effect on the privacy of government contractors' confidential records and an explosive effect upon the Comptroller General's power to intrude into the privacy of American business. Moreover, nothing in the government's brief contravenes the basic fact that this case presents important questions under the federal procurement laws which have not been, but should be, settled by this Court. Therefore, Lilly's petition for certiorari should be granted.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE.

Like Eli Lilly & Co., Abbott Laboratories is one of six companies which voluntarily co-operated with the Comptroller General by furnishing information during the first phase of a study of the pharmaceutical industry, which was initiated at the behest of the Subcommittee on Monopoly of the Senate Select Committee on Small Business. When the General Accounting Office ["GAO"] subsequently sought access to additional material, the

companies deemed it to be confidential and denied such access. To facilitate the further gathering of information which he considered necessary for the research study sought by Congress, the Comptroller General sent formal demand letters to each of the six firms, demanding access to company records which he contended were "directly pertinent to" certain government contracts for the sale of catalog items by each of the firms. These demands were alleged to be beyond the Comptroller General's statutory or contractual authority in five separate lawsuits, including the instant action and the case of *United States* v. *Abbott Laboratories,* now pending in the United States District Court for the Northern District of Illinois (Civil No. 75 C 2345).

On April 24, 1978, Judge Crowley granted summary judgment in favor of the government against Abbott Laboratories, based entirely upon the majority opinion announced in this case by the Court of Appeals for the Seventh Circuit; on July 25, 1978, Abbott's motion to alter or amend the judgment was denied. Abbott Laboratories intends to appeal to the Court of Appeals, contending, *inter alia,* that the *Lilly* opinion does not dispose of all the issues presented in the *Abbott Laboratories* case. However, a number of substantial legal questions are common to the two cases, including the effect of the Comptroller General's purpose in pursuing his demands for access, as well as the lawfulness of their scope, and the majority opinion in *Lilly* resolves these questions adversely to Abbott Laboratories' interests.

The Seventh Circuit decision in *Lilly* is a serious misstatement of the law pertaining to government contracts, which will permit unwarranted intrusion upon the private papers of contractors and therefore impede the ability of the government to procure economically the goods and services which it must purchase. In addition to those points presented in Lilly's petition for writ of certiorari, Abbott respectfully urges this Court (i) to consider the proposition that governmental demands for private

information must be judged by their primary purpose and (ii) to direct the trial court to weigh the consequences of awarding or denying the equitable relief sought. Accordingly, Abbott seeks leave to file this brief as *amicus curiae* in support of Lilly's petition.

ARGUMENT.

1. The Decision Below Conflicts with the Decision of the Fifth Circuit That the Lawfulness of a Governmental Demand for Information Must Be Judged by Its Primary Purpose.

The opinion below holds that the presence of "at least one legitimate purpose" validates an otherwise improper governmental demand for access to private papers. *Eli Lilly & Co.* v. *Staats, et al.,* 574 F. 2d 904, 910 (7th Cir. 1978). In so holding, the Seventh Circuit is in direct conflict with the Fifth Circuit decision in *United States* v. *Humble Oil & Refining Co.,* 488 F. 2d 953 (5th Cir. 1974), *vacated* 421 U. S. 943 (1975), *on remand* 518 F. 2d 747 (1975). Although Lilly has cited the *Humble Oil* case in its petition with respect to the propriety of the Comptroller General's demand, it has not specifically called to the Court's attention an important part of the holding which is relevant here. The Fifth Circuit held that the possibility of an incidental, lawful purpose will not excuse an unauthorized demand for information, but it is the *primary purpose* of the inquiry which determines its legality:

> "The information sought did not relate to a specific, extraordinary transaction as in *Bisceglia.* Nor were there any factually demonstrable grounds to suggest the likelihood of unpaid taxes. The summons was not issued to facilitate any ongoing investigation. Rather, the information was sought from Humble to expedite research on an IRS project concerning compliance with the lease restoration requirements of the Internal Revenue Code. An adjustment of tax liabilities may have incidentally resulted from the project, but the *primary purpose* of the project was research." 518 F. 2d at 748. (Emphasis added.)

There is no doubt that the *primary purpose* of the Comptroller General's demands in these cases has been, likewise, to conduct a research project. *E.g.*, Proposed Orders in *Lilly* and *Abbott*, p. 4. Abbott respectfully urges that this Court not let stand a novel and ill-considered rule which would encourage a government agency to contrive to gain access to corporate records when, in spite of possibly legitimate, incidental purposes, its admitted primary purpose for examination of such records is not authorized by the narrow statute upon which it relies.

2. The Decision Below Fails to Balance the Needs of the Government Against the Consequences of Awarding the Relief Sought.

It is well settled that, in awarding an equitable remedy, a court must weigh the needs of the plaintiff against the consequences to the defendant which would result from the relief sought. *E.g.*, *Eccles* v. *Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426 (1948). The need for such relief must be clear, not remote or speculative. *Id.* at 431. Abbott respectfully submits that the examination of books and records demanded by the government in these cases will result in substantial injury to Abbott, as well as to Lilly and the other firms involved, while yielding little, if any, benefit to the Comptroller General.

The scope of the "audit" or examination sought by the Comptroller General shows the extent to which the government seeks to intrude. The uncontroverted facts of record in the *Abbott* case are that Abbott's books and records for the two years in controversy contain over ten million documents located in the United States and numerous other documents, mostly in foreign languages and currencies, in forty-five other countries.* The proposed audit in the United States alone would take many months and would necessitate the diversion of Abbott executive,

* The facts describing the nature and impact of the proposed audit upon Abbott are stated in the affidavits of Lester E. Hammar and Robert F. Morris, filed, under Rule 56, in United States v. Abbott Laboratories.

accounting, legal, and staff personnel to supply documents, respond to GAO inquiries, and monitor the proceedings. As the GAO has described its audit process: ". . . the work proceed(s) very slowly because of the time-consuming processes of working through liaisons and setting up necessary meetings with company representatives." GAO Memorandum, August 27, 1975.

The benefits of the GAO's proposed "industry study" are remote and speculative; the government has never pleaded facts which would demonstrate any injury if its demands were not enforced. The "study" was not designed to examine statistically representative firms or products, but rather was capriciously instituted against the six firms which were most visible because they had voluntarily offered their assistance to the government. The principal objective of the "study" is to determine individual product costs, even though there are no generally accepted accounting principles which permit allocation of all costs to individual products. Abbott, itself, makes no attempt to fully-allocate costs to its individual products. The Comptroller General has acknowledged the arbitrariness of attempting to allocate costs to specific parts of a diversified business.

In contrast to the chimerical aims of the contemplated "study", the harm to the subject pharmaceutical firms is real and subject to some measure of ascertainment. Abbott has estimated that its direct costs in responding to the proposed audit would be in excess of $10,000 per month, plus the [illegible] costs attributable to disruption of normal business operations. Abbott's forecast of the audit's duration is a *minimum* of twelve months; if the GAO were permitted to peruse Abbott's papers for just sixteen months, fully one half of the entire revenue (not profit, but revenue) received by Abbott under the four contracts being "audited", $327,783, would be expended in direct costs before the task was completed. In short, the government now claims the unconscionable right to come in after a contract has been performed and require the contractor to spend such a disproportionate amount of money in submission to a "contract

audit" (even though it is conceded that no impropriety is suspected), that the value of the underlying contract to the contractor is negated!

Moreover, substantial and irreparable injury would result to the firms involved if the information obtained by the GAO were publicly disclosed. Such data would reveal decision-making methodology, business strategy, including marketing and pricing practices, and other proprietary information, which would give their competitors substantial, unfair advantages.

While the probability of disclosure remains a disputed question of fact, the possibility of that occurrence is hardly remote; the order proposed herein by the government explicitly contemplates disclosure of confidential data by the GAO to the Congress. Whatever the intention of the GAO may be with regard to disclosure of this data to the public, the GAO has recognized the intention of Congress:

> "[Senate Subcommittee Staff Economist] said that he would much prefer receiving the cost and pricing data on an individual product and company basis. He said that he felt that such data should be made public. . . ." GAO Memorandum, August 13, 1971.
>
> "[Senate Subcommittee Staff Economist] would prefer to press for obtaining such [cost] records without any strings attached so that the high profits could be publicized by product and firm." GAO Memorandum, October 15, 1971.
>
> "[Chairman of the Senate Subcommittee and its Staff Economist] feel that we should press our right of access to the cost records—through the courts if necessary—with a view to using the data in any way we see fit, and more particularly in any way the Small Business Subcommittee wishes to have the information." GAO Memorandum, October, 1971.

These memoranda and the proposed order demonstrate that this highly sensitive material, delivered to the Congress by the GAO, *will* be intentionally disclosed to all, including competing pharmaceutical firms.

CONCLUSION.

If the majority opinion of the Court of Appeals here is allowed to stand, all prospective government contractors will be on notice that they may be subjected to broad government intrusions into their company files for reasons unrelated to the supply contracts which would provide the excuse for such invasions.

For the foregoing reasons and for those advanced by Eli Lilly & Co., Abbott Laboratories respectfully urges that Lilly's petition for writ of certiorari herein be allowed.

Respectfully submitted,

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August 23, 1978.